No. 3084.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

CLINTON J. HUTCHINS,

Appellant,

vs.

AMERICAN STEAMSHIP "GREAT NORTHERN," Her Engines, Boilers, Tackle, Apparel, Boats, Furniture and Appurtenances, and A. AHMAN, Master, Bailee and Claimant Thereof, and THE GREAT NORTHERN PACIFIC STEAMSHIP COMPANY, a Corporation, Owner Thereof,

Appellees.

BRIEF OF APPELLANT.

Upon Appeal From the United States District Court for the District and Territory of Hawaii.

FREDERICK MILVERTON,
Attorney and Proctor for Appellant.

THOMPSON & CATHCART,
GEO. A. DAVIS,
Of Counsel.

THE RECORDER COMPANY, 669 STEVENSON ST., S. F.

INDEX

CITATIONS

No. 3084.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CLINTON J. HUTCHINS,
Appellant,

vs.

AMERICAN STEAMSHIP "GREAT NORTHERN," Her Engines, Boilers, Tackle, Apparel, Boats, Furniture and Appurtenances, and A. AHMAN, Master, Bailee and Claimant Thereof, and THE GREAT NORTHERN PACIFIC STEAMSHIP COMPANY, a Corporation, Owner Thereof,
Appellees.

BRIEF OF APPELLANT.

Upon Appeal From the United States District Court for the District and Territory of Hawaii.

STATEMENT OF THE CASE.

On the 4th day of April, 1916, the appellant, Clinton J. Hutchins, filed in the United States District Court for Hawaii, a libel *in rem* against the American Steamship "Great Northern," etc., claiming the sum of $15,700 damages, on account of injuries alleged to have been sustained by him while a passenger on the vessel.

The libel alleged that on or about February 14th, 1916, the libellant and his wife engaged first-class passage on the Steamship "Great Northern" for a voyage from San Francisco, California, to Honolulu, Hawaii, and return, and paid the full first-class rate charged for the same; that in consideration of the passage money, the libellant was to be provided with first-class accommodations; that it then and there became the duty of the steamship and its owners and officers to provide libellant with a safe passage, and to provide safe and proper appliances and equipment on the vessel so that libellant could make the voyage without harm or injury to himself; that in consideration of the passage money, and by reason of the agreement under which the libellant embarked as a passenger on the vessel, the libellant was to be furnished with a safe and proper place for bathing, and that it then and there became and was the duty of the vessel, and its owners and officers, to furnish and provide for the use of libellant, a safe and proper bath-room, with safe and proper equipment and appliances for the bath. (Tr., pp. 15-16.) These allegations of the libel were admitted by the answer. (Tr., p. 28.)

The libel further alleged that in violation of these agreements and duties, the rooms fitted up as shower-baths on the vessel were carelessly and negligently constructed so that they were dangerous and unsuitable for the purpose of taking a shower bath; that the base or bottom of the shower bath was a porcelain bowl about two feet square, with sides from three to four inches high, with a slight depression in the

center and a slope thereto from all directions to the drain in the center of the bowl; that the sides of the shower-baths were constructed of marble slabs, with service pipes for both hot and cold water running up the side of one of the slabs; that in order to reach and enter the shower bath, it was necessary to step over the top of the rim of the bowl; that by reason of such construction the bowl was slippery and difficult to stand upon; that there was no provision made by means of rails or otherwise, for grasping or holding on in case of slipping, nor was there any provision made by rubber mats or otherwise to prevent slipping or falling in the baths; that at all times, and more especially when wet, the bowls were slippery and dangerous; that such construction and equipment and lack of equipment made and rendered the shower baths unsafe and dangerous and was negligent and careless, as was to the vessel and its owners and officers then and there well known, and that notwithstanding such negligent and faulty construction, equipment and lack of equipment, and notwithstanding the dangerous character of the shower baths, they were held out and made known to all of the passengers, and more especially to the libellant, as proper and safe baths both in construction and equipment. (Tr., pp. 16-17.)

The libel also recited that on the morning of February 18th, 1916, while on board the "Great Northern," on the voyage referred to, the libellant, relying on such representations and agreements that the shower bath rooms were safe and usable, entered one of them for the purpose of taking a bath, having been

called for that purpose by the bath steward in charge; that without any fault or negligence on the part of libellant, as he stepped up over the rim of the porcelain bowl, and as soon as his feet were on the porcelain bowl, by reason of the slipperiness of the same and because of such faulty and negligent and careless construction, he slipped and fell; that he was thrown heavily on his left side, his left hand striking in the bowl of the bath opposite to the one he had entered, the construction of which was of the same kind, and that his hand slipping on the slippery porcelain bowl and the weight of his body coming on his arm, his left shoulder joint was fractured, and he sustained severe injuries and bruises and a severe shock to his nervous system. (Tr., pp. 17-18.)

The further allegations of the libel dealt with the nature of the injury, the pain and shock suffered by the libellant, and the expense incurred by libellant for medical attendance and treatment as a result of the injury, and concluded with the allegation that the broken shoulder joint and the bruises, shock, suffering and pain were occasioned and brought about by reason of the carelessness and negligence of the vessel and its owners and master, and without fault, want of care or negligence on the part of the libellant. (Tr., pp. 18-20.)

On February 16th, 1917, and before the hearing of any testimony, the libellant, having first obtained leave of court, filed an amendment to the libel. It was alleged in the amendment that it was the duty of the steamship, its owners and master, to employ, and keep

employed, and have on board the vessel, a competent and skillful physican to attend to libellant, and to exercise medical care and surgical skill in healing and endeavoring to heal and cure libellant of the injuries he had so received, and that it was also the duty of the steamship, its owners and master, to exercise the highest degree of care, and to render the best possible surgical and medical attention towards the libellant after he had sustained his injuries, in order to heal and cure him, and to continue to exercise the highest degree of care and skill towards him, after he had received the injuries, during the remainder of the voyage and until the arrival of the steamship at Honolulu. It was further alleged in the amendment that in violation of these duties and obligations, the steamship, its owners and master, did not employ and keep employed, nor furnish libellant with, a competent physician, but had an unskillful, incompetent physician on board the steamship, who failed and neglected to give proper care or exercise proper medical skill and attention towards libellant at any time during the voyage; that after libellant had received the injuries named, the incompetent physician treated the injuries unskillfully, negligently and improperly; that by reason of the incompetency of the physician the libellant suffered excruciating pain and torture after he had sustained the injuries and during the remainder of the voyage, because of the failure and neglect of the master and officers of the steamship towards him and because of the incompetency of the physician; that the physician did not make a proper examination of

the broken shoulder joint and injuries, and did not use proper skill in attending to the same, but treated it as a bruise and was guilty of gross negligence, and that the vessel, and its owners and master, employed, and kept employed, such wholly incompetent physician during all of the voyage, with full knowledge of his incompetency. (Tr., pp. 35-38.)

The answer of the claimant denied practically all of the allegations of the libel, except the second relating to the engaging of passage by the libellant and the duty of the vessel to furnish first-class accommodation and a safe and proper place for bathing, and a portion of the fourth. This answer affirmatively alleged that the shower bath in question was properly constructed; that the alleged injury was not in any manner caused or contributed to by the style or mode of construction or equipment of the shower bath room; denied that there was no provision by means of rails or otherwise for grasping or holding on in case of slipping; alleged that the accident occurred while the vessel was traveling on the high seas and that if the libellant sustained any injury by reason of having slipped or fallen while using the bath-room, such injury was occasioned solely by his carelessness and negligence in his use of the bath, and further alleged that the libellant failed to give proper attention to his alleged injury and neglected the same, and thereby greatly aggravated his injury and increased his pain and suffering therefrom, and prejudiced and prevented the normal healing thereof. (Tr., pp. 27-32.) The fourth paragraph of the answer contained the following admission:

"Answering the allegation of paragraph 4 of said libel, this claimant has no knowledge except by information from others, but basing his answer thereto upon his information and belief, *and, while admitting that the libellant, while using or attempting to use the shower room or compartment on the port side in the bath-room on 'C' deck of said vessel, lost his balance and fell and sustained some bruises or injury,* the exact nature and extent of which are to this claimant unknown, yet * * *" etc. (Tr., p. 29.)

The claimant also filed an answer to the amendment to the libel, which answer denied that the physician on board the steamship at the time referred to in the libel was incompetent, unskillful or negligent in his treatment and care of the libellant; denied that the physician when engaged by the owners of the vessel was known to them or to the master as being unskillful or incompetent, and denied that they employed or kept the physician employed knowing or believing him to be incompetent or unskillful. (Tr., p. 44.)

The hearing upon the issues thus made was commenced on February 16th, 1917 (Tr., p. 67), and concluded on March 20th, 1917, at which time the cause was argued and submitted. (Tr., pp. 424-425.)

A decision, or, as it is designated, an "Opinion of the Court on the Issues of Law and Fact in the Case," (Tr., pp. 645-676) was filed on April 3, 1917. (Tr., p. 426.) By this opinion the court found, among other things, that there was no negligence or liability on the part of the appellees, either by reason of the nature of the construction of the shower bath, or otherwise, held that there was no evidence to justify a finding that

the surgeon employed for service on the ship was incompetent, and concluded that Mr. Hutchins was not entitled to recover in the suit. This decision will be discussed more in detail under the heading of "Brief of the Argument."

A final decree, bearing date April 13th, 1917, was filed April 11th, 1917, dismissing the libel and awarding cost against the libellant. (Tr., pp. 677-678.)

A Notice of Appeal and Appeal, to this court, was filed by the libellant, Clinton J. Hutchins, on April 13th, 1917 (Tr., pp. 679-680), and this appeal was duly allowed and has been perfected.

The testimony adduced upon the hearing was directed mainly to the questions as to how the accident happened, the nature of the injury, the negligence or lack of negligence of the libellees in relation to the construction and dangerous condition of the shower bath facilities furnished, and the incompetency of the physician employed for service on the vessel. These are the principal questions involved upon this appeal, and they are raised by the Assignment of Errors filed in the court below (Tr., pp. 687-691) and incorporated in this brief.

SPECIFICATIONS OF ERRORS RELIED ON.

1. The Court erred in dismissing the libel in this suit.

2. The Court erred in finding and holding, that the admission in the libellees' answer that the libellant was injured while using or attempting to use the

shower bath or compartment on the port side of the bath-room on the "C" deck of the vessel, as set out more fully in the answer, was not binding on the libellees, and erred in finding and holding against the libellant in this connection, upon the contradicted evidence of one witness, that the libellant did not slip upon the bottom of the basin, but that he lost his balance and fell on account of the motion of the vessel when he started to step into the shower-room and before he placed either foot upon the floor or basin thereof, in the face of said admission contained in the answer and the proof adduced in support of the allegations contained in the libel that the libellant did fall in the compartment and was upon the floor of the basin of the shower bath at the time he sustained the injuries alleged.

3. The Court erred in finding and holding upon the facts appearing on the trial of said cause, that the weight of evidence was entirely on the side of the libellees, upon the issue as to whether the said steamship and the owner and master thereof violated its and their marine contract by failing to supply and furnish the libellant with a safe place in which to bath.

4. The Court erred in finding and holding that the steamship and its owner were, and are, not liable for any damages on account of the injuries received by the libellant, for the reason that the whole of the testimony taken together sustained the allegations of the libel by a clear preponderance of the evidence and established that the shower bath, and compartment, and the approaches thereto, and the basin itself into

and upon which the libellant had one foot at the time he fell and sustained the injury complained of, were dangerous and unsafe.

5. The Court erred in finding and holding upon all the facts appearing on the trial of said cause, that libellees were not to blame and had not violated the marine contract entered into between the libellant and the said steamship, its owner and master.

6. The Court erred in finding and holding that the libellees were not liable under the testimony adduced in the cause for the gross incompetency of the physician and surgeon in their employ and on board of said steamship, whose duty it was to treat sick and injured passengers skillfully, because the preponderance and weight of the evidence clearly established that the physician and surgeon was both incompetent and unskillful.

7. The Court erred in finding and holding that the libellees had placed on board of said steamship, in charge of the medical and surgical department, a competent physician, because there was no evidence to support such finding.

8. The Court erred in finding and holding that the marine contract entered into by the libellant and said steamship and its owner and master, had not been violated, and in finding and holding that a competent physician had been placed on board, because the proof in said cause fails to show that either the owner of said steamship, the master of said steamship, or any agent in their behalf, had exercised any care, or the

care required of them by law, or by statute, in selecting the physician employed for service on said vessel.

9. The Court erred in finding and holding that there was no evidence to justify a finding that the said physician was incompetent, because the evidence conclusively established that the treatment of the libellant by said physician was unskillful, and further established both incompetency and unskillfulness on the part of said physician, for which the libellees were, and are, responsible.

10. The Court erred in finding and holding that upon the facts appearing on the trial of said cause no damage had resulted to the libellant.

11. The Court erred in finding for the libellees and against the libellant.

12. The Court erred in finding and holding that neither the said vessel, nor the owner thereof, nor its master, had violated the marine contract, nor committed breaches of said contract, nor the duties or obligations arising therefrom, as alleged in the libel.

13. The Court erred in entering a final decree in said case in favor of said libellees.

14. The Court erred in making, rendering and entering its final decree in said cause upon the findings and records therein.

15. The Court erred in rendering and making its final decree in said cause, because said decree was, and is, contrary to law, equity and admiralty, and contrary to the evidence, facts and pleadings in said cause.

BRIEF OF THE ARGUMENT.

The argument may be conveniently divided into two main parts, embracing the following propositions:

FIRST, that *"The findings of the Court below that the accident was not caused by any negligence of the appellees, and that they are not liable, are clearly against the weight of evidence, and are not binding on this court";* and

SECOND, that *"The employment of an incompetent physician and surgeon for service on the vessel rendered the appellees liable for the additional pain and suffering caused the appellant as a result of the incompetency."*

In considering both of these propositions it becomes necessary to analyze the testimony somewhat carefully. Such an analysis will show that the findings of the court below on some of the main propositions involved are either against the great weight of the evidence or are entirely contrary to the evidence. Under these circumstances, this court is fully warranted, under the authorities, in examining the testimony and in drawing its own conclusions. There is no question but that the appellant was injured when about to take a shower bath on the vessel, and that he suffered great pain by reason of the injury. The testimony also shows that the appellant subsequently expended the sum of $115 for medical services in connection with the injury. (Tr., pp. 92, 135.)

I.

The findings of the court below that the accident was not caused by any negligence of the appellees and that they are not liable, are clearly against the weight of the evidence, and are not binding on this Court.

1. THE MANNER IN WHICH THE ACCIDENT OCCURRED AND THE SURROUNDING CIRCUMSTANCES SHOW THAT THE APPELLANT WAS WITHOUT FAULT AND IS ENTITLED TO RECOVER.

The manner in which the accident occurred was described by two witnesses, the appellant, Clinton J. Hutchins, and Barney R. Simon, who testified by deposition.

The testimony of Mr. Hutchins, who is a business man, 47 years old, and whose income from all of his activities and investments is from $15,000 to $20,000 a year (Tr., pp. 71, 72), was to the effect that on the night of the 17th of February, 1916, while a passenger on the steamship "Great Northern", between San Francisco and Honolulu, he notified the bath steward that he would like to have a shower bath the following morning, about half-past six. On the morning of February 18, 1916, at about the hour named, Mr. Hutchins was called by the bath steward and went over to the bath-room. He went up to the shower bath and put his right foot over into the bath. It was rather a high-sided bath and rather hollow. He put his foot in the bath, felt the temperature of the water on his arms, and then put his left foot over. He then slipped, put out his hand to catch hold of something, and fell over into a shower-bath that was on the opposite side. He fell sideways and reached

out for something to get ahold of but there was nothing. He felt a crunching in his shoulder, and his arm slipped from under him, so that it seemed to him that he had dislocated the shoulder. His arm went right against his head. He endeavored to get up but his whole arm was useless, and he did not seem able to get his breath. A man then came in and put his arm under Mr. Hutchins' neck, and Hutchins then reached up, got ahold of the knob of the door, and was lifted up still gasping for breath. At the time Mr. Hutchins fell both of his feet were in the basin. The surface of the basin was porcelain and at the time was filled with water and was very slippery. (Tr., pp. 74-77.) His feet flew out from under him, and he fell, as he says, "like a catapult." He threw out his left hand to break the fall and struck on his elbow. At the time he was facing the rear of the bath, with his back to the entrance. He fell on his left side. Mr. Hutchins says he did not lose consciousness at all. (Tr., pp. 80-83.) He had never been in that particular bath-room before he entered it on that occasion on the morning of February 18th. (Tr., p. 100.)

On cross-examination Mr. Hutchins testified that the shower-room in question was on Deck "C" and that prior to going into the shower-room where the accident occurred, as testified, he had never taken any shower on that trip. When he went into the room where the shower compartments were, the bath steward was there, and turned on the water, but was not there when the accident happened. Mr. Hutchins put his hands or arms in to test the temperature of the

water, before stepping in, but did not attempt to manipulate the faucet in any way so as to change the temperature. He was just going under the shower when he slipped. The water was splashing on to him just as he got in. He was part of the way under it when his feet flew out. He was not wholly under the water at the time. A good stream of cold water was coming straight down at the time; not in a fine spray but in heavy streams. At the time he slipped, he was bearing, if anything, heavier on the right foot than on the left. His left foot was over, and just as he got it down his feet flew from under him. He could not have used the marble slab on either side to support himself. He did not see how he could have used the marble slabs to have supported himself, because he went or fell out where there were no slabs, and there was nothing to hold on to. When he brought his left foot over and put weight upon it, both feet went from under him. He did not slip but just *went straight out as if he were stepping on ice, his feet just flew from under him and he came down with a perfect crash.* He could not state positively whether the water pipes were tight against the marble slab, but his impression was that they were, and that he could not have put his fingers behind them and got a hold. (Tr., pp. 122-127.) Another man came into the room just before Mr. Hutchins got up to take his bath. He was sitting down on the stool opposite to Hutchins and the libellant could not tell whether this man could see any portion of him or not. With the assistance of the man Mr. Hutchins regained his feet and was helped to the

stool where he sat until the man summoned the deck steward, and then sent for a doctor. (Tr., pp. 128, 129.) In falling Mr. Hutchins fell in the opposite shower compartment. He could not say how far in, but, judging from the way his arm flew from under him, he thought he went just over the edge of it, that is, his left arm went into the basin of the other compartment. Immediately after he fell, he was on his side bridged across between the two, his head in one shower and his feet in the other. In falling, both of his feet flew out, practically about the same time. When he felt himself go, both feet flew out and there was no stopping until he finally found he had struck something. His large toe was black the next morning. He had practically no warning whatever of the slip before it occurred. He grabbed out spasmodically with his right hand and then went down. (Tr., pp. 158-160.)

On redirect examination Mr. Hutchins further testified that when he fell he was just starting to step into the bath-room; he was leaning over with one foot over in the bath. He leaned over to test the water, putting it on his arms, etc., and then he pulled over the other foot and, just as he put in the other foot, he fell. He put his foot over just beyond the curve. The bowl curves and then slopes a little towards the center. He attributed his fall to the slippery condition of the floor, the slippery condition of the bowl, that is, he did not consider the bowl in its condition one that he would want to get into again. The water was running in the bowl, the steward having turned

it on. To his knowledge there was no lurch of the ship, and no movement on his part. If anything, he was leaning forward instead of upright, and there was no premonition of the fall. It was very quick. He was sure he reached out his right hand to grab before he fell. (Tr., pp. 173-174, 175.)

Barney R. Simons, testifying for the libellees, on direct examination, said that he was a dentist by profession and resided at Philadelphia, Pa. He was a passenger on the steamship "Great Northern" at the time Mr. Hutchins was injured. He described Mr. Hutchins as a man about five feet seven inches tall, weighing about 200 to 220 pounds, very heavy from the waist line up, enormously thick through the shoulders, rather short legged, and balanced as well as a man of that height and weight could be balanced. He was a heavy set man, probably between *55 and 60 years of age*. This witness' *recollection* was that Mr. Hutchins slipped before he got in the shower, that is, between the two baths. It was in the shower-bath room. Mr. Simons was the only one present that saw the accident. (Tr., pp. 562-565.) When the witness entered the bath-room, Mr. Hutchins stood in the space between the two showers—the passage-way between the two showers. As he was a large man, he occupied practically the entire passage-way, so that the witness could not enter the shower opposite the one in which Mr. Hutchins was tempering the water. The witness sat down on the stool and observed Mr. Hutchins until such time as he might get out of the passage-way. Mr. Hutchins stood with his left hand

against the wall, and with his right hand was tempering the water, or feeling the temperature of the water. The ship at about this moment lurched. At the same time Mr. Hutchins endeavored to step into the shower. He stepped with his right foot forward resting his weight on the left, when his left foot slipped from under him and he fell with his left shoulder upon the edge of the basin of the shower. *He fell helplessly; that is, he had no chance to catch or save himself whatever as he fell.* The witness went to Mr. Hutchins' aid, that is, dragged him from his position, catching him by the feet, got him into the lobby of the shower-room, and found that he was unconscious. (Tr., pp. 574-575.)

The deposition of this witness is rather confusing by reason of the fact that he testified with reference to a diagram he had evidently made, but the diagram was not made part of the deposition, was not apparently before the lower court, and is not in the record.

The witness Simons further stated on direct examination, that at the time Mr. Hutchins fell he was stepping under the shower. He slipped when his one foot was still in the passage-way and the other was in the air, and it was the foot that was still in the passage-way that slipped out from under him. This occurred coincident with the lurching of the ship. He stepped with the right foot, resting his weight on the left. The witness could not recollect whether he supported himself against the side of the shower or just stepped in, and could not say whether he dropped his left hand as he started to step under the shower. He did not see

that there was anything there to support him with his right hand. He could have got ahold of the slab on the after side of the shower with his right hand, but the witness could not say what support that would have given him. (Tr., pp. 576-577.) By saying that Mr. Hutchins had fallen very suddenly without opportunity to catch himself as he fell, the witness meant that he did not have an opportunity of getting his left hand under him to break the force of his fall. *He fell without any possible way of catching or stopping himself,* that is, he fell so quickly he could not get his hand out to save himself. It was simply as if you had pulled both legs from under him and he fell down. There was no opportunity to do anything. (Tr., pp. 581-582.)

On cross-examination the witness Simons testified that when he saw Mr. Hutchins standing with his left hand extended and against the rear wall and his right hand reaching into the shower space, he did not think Mr. Hutchins had an opportunity to grasp the marble frame at all as he fell. (Tr., p. 582.)

As bearing upon the manner in which the accident happened, there is considerable testimony in the record as to the condition of the weather at the time.

Mr. Hutchins, the libellant, testified on direct examination, that the condition of the sea at the time of the accident was calm. He did not notice any movement that morning. It was the only morning they had when there seemed to be none. The ship was not rolling or pitching that he noticed. (Tr., p. 77.) On cross-examination he said that he did not notice any

motion of the vessel at all as he stepped into the bath and would say that there was practically none. The morning was a calm one; there was scarcely a movement of the boat any more than on a very calm day. It was not perceptible. (Tr., p. 124.)

Mr. John B. Morris, the chief engineer of the "Great Northern," a witness for the libellees, testifying on direct examination, stated that he thought that on the day of the accident the ship was rolling quite a little. That was his best recollection. (Tr., p. 259.)

Mr. Charles Wall, Chief Officer of the "Great Northern," who testified by deposition on behalf of the libellees, identified the log-book of the ship, showing the weather conditions on February 18, 1916. (Tr., pp. 487-489.) This portion of the log-book was introduced in evidence and is Claimant's Exhibit No. 4. (Tr., pp. 546-547.) From this log-book the following appears:

"Time by Clock 4 (presumably 4:00 a. m.)..... Wind S. W. 2 Weather B Barometer 30 21 Thermometer 65 Remarks Fine and clear light breeze smooth sea heavy N W swell."

"Time by Clock 8 (presumably 8:00 a. m.)..... Wind South, 4 Weather B. q. Barometer 30 27 Thermometer 73 Fresh Breeze passing squalls small sea heavy Nly swell."

"Time by clock 12.....Wind S. W. 4. Weather B. C. Barometer 30 29 Thermometer 76 Remarks Fine weather mod breeze small sea mod swell."

Later in the log-book are the notations:

"Remarks fine weather, partly cloudy, mod N. W.

swell," "remarks fine and clear weather fresh breeze heavy Nly swell," and "remarks, fine weather mod breeze small sea heavy swell."

As it will be seen, it is impossible to say from this logbook what the condition of the weather was at the time of the accident, which the testimony shows was about 6:30 a. m.

Mr. George Grundy, a witness for the libellees, who also testified by deposition, further identified the logbook and said that the entries were made at the end of each watch of four hours. (Tr., pp. 494-496.) On cross-examination he explained the abbreviations and testified that the swell on the day of the accident was no heavier than it had been for previous days, that the sea was about the same, and that the swell was just about the same from the time the vessel got well out in the ocean until it reached Hilo. (Tr., pp. 496-498.)

Mr. Sam B. Stoy, manager of the London and Lancashire Fire Insurance Company at San Francisco, who was also called as a witness for the libellees, testified that he remembered the weather conditions on the vessel at the time of the accident and that, so far as ocean travel was concerned, the sea was fairly calm, that is, it felt so to his belief, and he was fairly comfortable. (Tr., pp. 533-534.)

On the other hand, the witness Barney R. Simons, who testified by deposition on behalf of the libellees, whose testimony as to the manner in which the accident occurred varies considerably from the statement of Mr. Hutchins, and who said that the age of Mr.

Hutchins was probably between 55 and 60 years, when, as a matter of fact, his age was 47 years, also testified as to the condition of the weather at the time of the accident. He said on direct examination that the *weather then was bad and the sea was very rough;* it was so rough that he could not sleep during the night. That morning when the steward called him and said his bath was ready, he did not want to go because of the pitching and rolling of the ship, and he told his wife he did not think he would go, but she said: "You haven't missed a morning bath in a year, and you may be sorry if you don't take one." So he got out very cautiously and went to the shower, supporting himself with his hand on each side of the passage-way as he went along. It was impossible, he said, to walk straight, unassisted, without holding on to the sides of the passage-way. (Tr., pp. 573-574.) At the time he took his bath that morning the ship was pitching and rolling and lurching occasionally. (Tr., p. 577.)

The Court in its decision, in commenting upon the evidence relating to the happening of the accident and the condition of the weather, relied wholly and solely upon the testimony of the witness Simons, notwithstanding its confusing nature and notwithstanding the fact that his statements as to the condition of the weather sharply conflict with the great weight of the evidence.

The Court, too, in its comment as to how the accident happened, said:

> "There was an eye witness (Barney R. Simons) to the accident, whose deposition, if true, shows that the libellant fell *before he ever entered the*

> *bath-room,* before he put either foot on the floor of the basin, and that his fall was caused by the rolling of the vessel, the libellant losing his balance when he started to step into the basin, one foot on the floor of the compartment *outside the bath-room,* the other raised for the purpose of stepping in." (Tr., pp. 660-661.)

It cannot be gathered from a reading of the deposition of Mr. Simons that the libellant fell before he entered the bath-room and that he lost his balance when he had one foot on the floor outside of the bath-room and the other raised for the purpose of stepping in.

The Court, however, found on the vague and contradicted evidence of Mr. Simons, that the libellant did not slip on the bottom of the basin, but that he fell because he lost his balance on account of the vessel lurching when he was about to step into the bath-room, and that his fall was not caused by any negligence of the vessel or its owners or servants. (Tr., pp. 661, 662.)

As we will show by the authorities later, this Court is at liberty, particularly where the consideration of depositions are involved, to wholly disregard the findings of the lower court and to form its own conclusions from an examination of the testimony.

The evidence overwhelmingly shows that at the time of the accident there was no such unusually rough weather as was testified to by Mr. Simons. It can fairly be assumed that the weather was normal, and the evidence as a whole in the case shows that the accident occurred without any fault or negligence on the part of the libellant, and while using an appliance

furnished by the libellees for use by the passengers of the ship.

The libel alleges that the accident occurred after the libellant had entered one of the shower-baths for the purpose of taking a shower bath therein. This was nowhere denied in the pleadings, but, in fact, was specifically admitted in the answer, as shown by the following extract:

> "Answering the allegations of paragraph 4 of said libel, this claimant has no knowledge except by information from others, but basing his answer thereto upon his information and belief, *and while admitting that the libellant, while using or attempting to use the shower-room or compartment on the port side of the bath-room on "C" deck of said vessel, lost his balance and fell and sustained some bruises or injury, the exact nature and extent of which are to this claimant unknown,"* etc.

The issues in the case, as made by the pleadings, did not leave it open to the court below to find or hold that the accident happened outside of the bath-room.

Neither party can contradict by proof the averments in his pleading, and the opposite party is entitled to rely thereon as an admission of facts.

> *Totten* vs. *The Pluto,* Fed. Cas. 14, 106;
> *Ward* vs. *The Fashion,* Fed. Cas. 17,154, at p. 185.

The allegations in the answer of a party admitting facts to his prejudice will prevail against testimony to the contrary.

> *The Santa Claus,* Fed. Cas. 12,327.

See, also,

> *The Belle,* Fed. Cas. 1271.

Not only did the court below, in passing upon the manner in which the accident happened and the surrounding circumstances, find contrary to the great weight of the evidence, but it ignored absolutely the issues made by the pleadings and the admissions of the answer, and seems to have assumed that because it found that the vessel lurched at the time of the accident the libellees would be relieved from liability, ignoring the fact that it was their duty to furnish instrumentalities and appliances that would be safe in bad weather as well as in good.

2. THE CAUSE OF THE ACCIDENT WAS A NEGLIGENTLY CONSTRUCTED, DANGEROUS, UNSAFE AND UNSUITABLE SHOWER BATH.

The fact that the libellant fell, under the circumstances shown by the evidence, while using a bath-room furnished by the vessel without any fault or negligence on his part so far as the record shows, entitles him, as a matter of law, to recover, unless it further appears affirmatively that the libellees were without fault and were not guilty of any negligence. Much of the evidence in the case was directed to the question as to whether the shower bath was safe, and inasmuch as there is practically no conflict in the evidence as to the manner in which it was constructed, and its arrangement, this Court is as well able to pass upon the question as the court below. The only real conflict in the evidence concerning the shower bath arises by reason of the different opinions of the witnesses as to its safety, and with all the facts before it, this Court can as well form its own conclusions and

opinions as the witnesses in the case, or the court below.

The following is a fair abstract and synopsis of all of the evidence in the case upon this point. As the witnesses, A. Ahman, John B. Morris, C. S. Mills and W. H. Metzler testified in open court their depositions (Tr., pp. 436, 475, 466, 504, 613) were not offered or received in evidence. (Tr., pp. 241-242.)

(a) *As to the general construction and equipment of the bath.*

The libellant, Clinton J. Hutchins, testified that the surface of the shower bath was of porcelain, and at the time of the accident was filled with water and very slippery. He thought the bowls were about two and a half feet square and perhaps five or six inches deep, slightly concaved towards the middle, and with a drain in the middle of the bowl. Three sides of the bath were of polished marble, and there were two pipes running up. (Tr., p. 77.) One he supposed conducted the hot water and the other cold water to the bath. The pipes were tight against the wall and you could not get your hand around them. (Tr., p. 80.) The surface of the bath was smooth, glazed porcelain. (Tr., p. 81.)

On cross-examination Mr. Hutchins testified that he should say that it was two feet six or so, something over two feet between the two compartments on the floor (Tr., p. 128). The porcelain surface of the basin was glazed. He used to be in the plumbing supply business at one time, he said, and was pretty

familiar with such things. It was what is known as Imperial ware. It was different from the ordinary iron white porcelain bath tub. He thought the surface was much more smooth. It was perfectly smooth, glazed. Tr., pp. 157-158.) Sometime after the accident he went into the shower room again to examine it. He had complained about the condition of the shower as it was maintained by the ship, and he went to see whether any change had been made in the shower of any kind. He recommended to Mr. Stone that they tear out the slippery bowls and put in smooth concrete so that it would hold. He had always seen in all ocean trips he had made either a large railing or a firmly fixed handle to hang on to, or a grating for the shower, in the shower baths. (Tr., pp. 164-165.)

On redirect-examination Mr. Hutchins said that he thought one of the pipes he mentioned was for hot water but he could not tell of his own knowledge. There was no door into the bath compartment but there was a rubber curtain over the entrance which had been pulled back when he went into the bath-room. There were two bath-rooms there with a hall-way or passageway between of about two and a half feet. There was a light in the ceiling of the bath-room (Tr., pp. 171-172).

On recross-examination (Tr., pp. 175-176) Mr. Hutchins said that the curtain was just about in the position shown by Claimant's Exhibit No. 3 (Tr., p. 545).

Francis G. Lefebre, who testified by deposition on behalf of the libellant, said that at the time of the accident he was employed on the steamship "Great Northern" as a waiter. He further testified that at that time there was no mat on the floor of the shower bath where the accident occurred. Tr., p. 598.)

H. E. Wescott, a witness for the libellant, who resides in Honolulu, and who is the purchasing agent for the City and County of Honolulu, testified on direct-examination that in the latter part of March, 1916, he had occasion to visit the bath-rooms on the steamship "Great Northern" in company with Mr. Bicknell, the City and County Auditor. (Tr., pp. 204-206.)

On redirect-examination he stated, among other things, that they looked at the shower bath in question and it looked pretty slippery. (Tr., p. 210.)

W. H. Metzler, who described himself as a special agent of the "Great Northern Pacific Steamship Company," testified for the libellees. He said on direct-examination that the water pipes shown on the two photographs, Claimant's Exhibits 2 and 3 (Tr., pp. 544, 545) showed the shower baths as they were at the time of the accident except for the installation of some soap dishes. The water pipes shown on the photographs were far enough from the wall to enable a person to get his fingers behind them. One of the pipes was for hot water, the other for cold water, and the center pipe conducted the water to the shower. (Tr., pp. 216-217.)

On cross-examination Mr. Metzler said that he ex-

amined every shower bath on all the decks on the day of the accident. There had been some complaint about the hot and cold water not working just right. These pipes were pretty close together and he did not know which one was the hot water pipe. He thought the one on the right. A man visiting there for the first time might be liable to catch hold of the hot water pipe, but he did not know whether that would burn him. He did not think it was as hot as that. He did not know that a man had gotten his hands blistered in catching hold of the pipe. He could not say off-hand how far the pipes were from the wall, but you could get your fingers around all right. He did not recall that he had tried it. He never tried to get his fingers in that he recalled. (Tr., pp. 222-224.) The handle shown turned on both the hot and cold water. The lever was used to mix the water. He did not know what the temperature of the hot water was, but it was perfectly safe to catch hold of the pipe. The complaint he referred to that the water did not properly mix was due perhaps to not knowing how to regulate it. Tr., pp. 226-227.)

J. B. Morris, chief engineer of the vessel, also testified on this point for the libellees. He said that Mr. Hutchins, the day after the accident, told him that in stepping in the shower he had stepped on the rounding of the base, just opposite the cross in the picture, Claimant's Exhibit No. 1 (Tr., p. 543), and also stated that at that time the shower baths were not properly built, instead of being round they should be square, that they should have square corners. The

witness understood Mr. Hutchins further to say that as he was stepping in the shower room his foot slipped on that rounding. The hot and cold water pipes were about two and a half inches from the wall. There was plenty of room behind the pipes for a man to get his hand in. He was not sure which was the hot and which was the cold water pipe. The floor of the basin in the shower compartment was about two and a half feet square, including the room. The basin itself would be three inches less. There was a slope towards the center of the basin of about one-half inch to drain it off. The facilities in the compartment for a person using the same to support himself were, first, the handles or grab bars, then the curtains, which were put up strong enough to hold the weight of a person provided he should fall; then the marble side of the shower. A person could grab the side of the marble slab and then grab either of the pipes, or with his left hand could grab the door knob. There were four things a person could grab hold of, the *wall,* the *curtain,* the *grab bar* and the *pipes.* The witness in this connection was testifying with regard to conditions as shown by Claimant's Exhibit No. 2 (Tr., p. 544). The witness also said that the base of the compartment or basin was made of tiling, porcelain, the same as the porcelain used in the ordinary porcelain bath tub. The witness had traveled on probably seventeen different passenger steamers as an officer. None of these were fitted with similar shower arrangements, but the showers were arranged over the ordinary porcelain bath tubs. (Tr., pp. 243-248.)

Counsel for appellees then attempted to qualify the chief engineer of the steamship as an expert on bath tubs. The engineer said that he had given attention to the matter of equipment and bath-room facilities on board of vessels where he had served as an officer, as well as to the matter of selecting the appliances to be installed, and the matter of safety facilities for the persons using the installations. Aside from the answers based on these general questions, however, no special qualification was shown (Tr., pp. 248-249). Mr. Morris further testified on direct-examination that the radius of the circle in the corner of the bowl was about an inch and a half. The drain or strainer in the center was probably three and a half inches in diameter. The bath-room was well lighted. The witness said he looked after the building of the showers on the "Northern Pacific," and said that in his opinion the shower bath could be used with perfect safety, because every means that he knew of had been provided for. *He had not in his experience known of any shower room or compartment with any other facility or device that he had known or heard of that was absent from this particular compartment.* (Tr., pp. 251-254.) The vessel had carried probably 80,000 passengers since she was built and the shower baths were continually used. No complaint had been made to him as an officer of the company as to the manner of construction or the condition of the shower baths prior to complaint made by Mr. Hutchins. He did not make inspections of the shower baths aboard the vessel regularly, but he had a man that did. He

thought that if a shower compartment of this character was furnished with a rubber mat in the bottom of the basin it would be dangerous, because if one were to rub themselves down with soap and his feet would be soapy, he would have a tendency to slip and slide on rubber more so than on porcelain. (Tr., pp. 255-258.) This opinion of Mr. Morris, which was given against the strenuous objection of counsel for the libellant, was not based in any manner upon any special showing of qualification.

Mr. Morris was later recalled, on behalf of the libellees and testified that the rod shown on the photograph was intended to hold the curtains so that when a person went in the shower, he could be closed in the shower bath by drawing the curtains. When the rods were put in they had to take into consideration that they must be strong enough to sustain the weight of a person who might grab the curtains and bear them down. The rods were about one and a half inches in diameter and were secured by bolting on to the marble slab on the other side. They would sustain the weight of a man over 200 lbs. The only purposes or offices of the rods were to hold the curtains surrounding the shower baths. That was the only purpose they are used for. A demand might be made on the rod at any time to hold the weight of a person when the ship was rolling, when one would have a tendency to grab anything to hold themselves. Since the photographs were taken the mixing valve had been changed. (Tr., pp. 298-300). In view of his study of the subject and of the experience he had already indicated, and

irrespective of whether or not he had seen any improvements or devices elsewhere, he said that he could not suggest any additional facilities, or method of construction, or arrangement of any kind which, if incorporated or used in the shower room, would in his opinion be a further safeguard to persons using it. (Tr., p. 301.) He enumerated a number of vessels upon which he had served as engineer, and none of these vessels, excepting the "Great Northern," and its sister ship the "Northern Pacific" had regular shower baths or compartments of the kind on the "Great Northern," where the accident occurred. They had just an ordinary porcelain tub where the shower was arranged to play into the bath tub while a person was standing in it. (Tr., p. 302.) In his opinion, a person would have more chance to hold on to something in a shower bath such as was on the "Great Northern" than in the ordinary bath tub (Tr., p. 303).

It will be noted that the only facilities furnished in the shower bath on the "Great Northern," and upon which the chief engineer based his conclusion that the bath-room was a safe one, were a small door knob, water pipes, one of which was for hot water, a rod and curtain, which, upon a person entering the bath would be at his back and above him, a smooth marble slab, and a tiny handle attached to a marble slab at the far end of the bath, which last, in all probability, if a great mass of evidence is to be believed, was not there at the time of the accident at all.

On cross-examination Mr. Morris further testified that when a bather is standing in the shower bath

where the accident happened, that is, after he gets in with his face to the wall, he would have a chance to catch hold of the curtain rod, although the witness admitted that the rod would be right behind him, that he would have to put his hands behind and reach back to catch it, and that it was probably six feet high. He admitted, however, that this would not be the natural way for a man to do. He thought the distance between the slab and the pipes was about two and a quarter inches, although he had never measured it. He remembered looking at it and judging the distance. The handles on the valve had been taken out on account of the difficulty in mixing and it being too much trouble to overhaul them. They leaked and would not mix properly, so it was thought a better arrangement to put two valves on. One of the pipes that ran up the side of the marble slab was for hot water. The nearest one to a person's left hand was the cold water pipe. The hot water pipe would be about the same distance from a person's right hand as the cold water pipe. (Tr., pp. 319-323.)

A. Ahman, the master of the steamship "Great Northern," which was built at William Cramp & Sons' shipyards at Philadelphia, testified for the libellees, and on direct-examination said that he had been operating passenger ships since 1886, practically all over the world, but largely on the Pacific China trade, and to Japan, Panama and Central America. He had been in no ships that had been equipped like the "Great Northern" was, with bathrooms and showers separate. He had observed on the other vessels

just what the equipment and facilities for bathing on passenger vessels as a rule were, and on all the vessels in general that he had seen there had just been a shower on top of the bath tub, that is, over one of the round porcelain baths. (Tr., pp. 263-267.) He repeated that none of the steamships he had referred to were equipped with shower baths of the kind on the "Great Northern," except its sister ship "The Northern Pacific" (Tr., p. 269). In describing the bath in question he said that it was on the port side. On the right hand side was a marble slab about thirty inches wide, and on the left hand side was also a marble slab of similar size against the wall of the heater-room. Across, on top of the entrance, was a bar *for assisting in going into the shower room* and used also as a curtain rod. It answered two purposes. In the bottom of the shower was a porcelain basin, slightly lower towards the center, sloping probably one-half an inch to an inch from the edges, and on the entrance was a sort of wash board, or a coaming, rounded up to three inches on the outside, and about the same on the inside, with a rounded top, and directly on the wall was a grab handle or grab iron. As to the other facilities for purposes of safety to a person using the bath, there was a good sized *door knob* on the door to the heating room, which could also assist a person going in there if he did not want to reach up with his right hand and get a hold of the bar or grab iron. (Tr., p. 270.) He did not know which of the pipes on the left wall of the shower compartment, as shown in the photograph, was for the hot

water. He guessed the handle showing on the photograph was there now, but the valves were changed after the accident on account of their being worn out and leaking. On being asked what his observation was of shower bath facilities with a view of determining the features of safety in their use, the witness said he did not see any way the baths could be improved on, and that he had seen no ships that had the same facilities for bathing that they had on the "Great Northern." They were absolutely the best he had ever seen. On being asked again whether he had given attention to the point of safety of shower baths, generally speaking, he merely replied that he could see nothing wrong with them and he did not know of any improvement that could be made from the standpoint of safety unless two assistants were placed there to hold people up from falling down. There was a light right in the center of the deck that would show all over the bathrooms and the showers. (Tr., pp. 273-276.)

On cross-examination Mr. Ahman said that he did not know from a personal examination of the shower bath whether on the morning of the accident it was slippery or not. He did not think the hot water pipe against the slab was hot enough to blister a person's hands, but he had never tried it, and would not try it. (Tr., pp. 283-284.) The bowl of the shower was made of porcelain and he did not think that porcelain was more slippery than zinc. It was not positively smooth porcelain, not highly polished, not glazed. It was not what is called glazed porcelain. He would

call it frosted porcelain. On being asked whether it was very slippery he said he would not say it was any more slippery than zinc, and being asked again if it was not slippery, he said he would not say it was. He said also that if wood was wet it would probably be more slippery, and that he honestly believed *it was not any worse than standing on dry wood.* He would be willing to swear that the porcelain bowl was not more slippery than the zinc edge of a mat indicated by counsel in the courtroom, which the witness said he could see from where he was being examined. (Tr., pp. 285-286.)

Such far-fetched opinions of course refute themselves.

Walter A. Scott, testifying on direct-examination for the libellees, by deposition, said that he was a photographer and as such, on May 1st, 1916 (almost two months and a half after the date of the accident), took the photographs received in evidence and marked Claimant's Exhibits Nos. 1, 2 and 3 (Tr., pp. 543, 544, 545). The white line on the right side of the picture, Claimant's Exhibit 3 (Tr., p. 545), represented a marble slab about an inch and a half in thickness. The handle in the center of the picture was fastened to the back wall of the shower by four screws. The pipes on the left hand side of the picture were there when the photograph was taken. The door knob, he judged from the protograph, was metal, but he did not observe it carefully at the time. The basin shown in Claimant's Exhibit No. 1 (Tr.,

p. 543) was made of the same material that porcelain bath tubs were made of . (Tr., pp. 430-433.)

H. K. Relf, General Claim Agent of the Great Northern Pacific Steamship Company, residing at Portland, Oregon, also testified by deposition on behalf of the libellees. He said he examined the shower bath in question after February 18th, 1916, he thought on the return of the vessel from Honolulu. He had seen this shower approximately about once a month. He did not make regular inspections or anything of that kind, but looked over the ships when he was on them. He should say he had seen the shower bath six or eight times since the accident happened. He employed the photographer to make the photographs introduced in evidence. (Tr., pp. 453-455.) He described the shower bath as follows:

> "The room in which these shower-baths are located is on the 'C' deck, almost amidships. The entrance to the rooms is from the passageways on both sides of the ships. There are two showers in this room on the 'C' deck opposite each other. The base or receptor of the shower bath is thirty inches square. The rim is six inches high, the top of the rim being six inches above the tile floor out of the bath room. The bottom of this rim is about three and a half inches in width; from the edge of the receptor to the waste in the middle of it there is a fall of a quarter of an inch in a distance of eleven inches or eleven and a half inches. The shower in which Mr. Hutchins went to take his bath, as I was informed by the bath steward, was located upon the port side of the ship. Upon entering that shower there would be a marble slab on his right hand; the slab is about one inch in thickness, *76 inches high* and 32 inches wide. On

> the left of the shower bath there is another marble slab which is up against the wall of the heater-room, and the door which is shown in the photograph is the door to the heater-room. Then on the marble slab to the left of the person as they are facing the shower baths are three pipes with valves which are used in regulating the flow of water and the temperature of the water. The back wall of the shower is another marble shower (slab?), to which is attached a grab or hand-hold, which is 60 inches above the floor of the room. *At the upper part of the slab* is a rod about an inch and a quarter or an inch and a half in diameter on which a curtain is sustained by means of rings. Opposite to this particular shower bath compartment is another identically the same in construction. There is a space of 26½ inches between the two receptors." (Tr., pp. 455, 456.)

From this description it appears that the curtain rod is approximately six feet four inches above the floor of the shower bath.

This witness further testified on direct examination that the door of the heater-room is supposed to be kept shut, except when the attendant has occasion to use it. Entering the shower-bath, the facilities that presented themselves to a person desiring to take a bath to safeguard himself from falling were, the marble slab on his right hand, a rod above him about 72 inches from the floor, and the three pipes on his left hand, the first of which was a cold water pipe. A person could catch hold of the cold water pipe, and then, by reaching over to the grab on the back wall of the shower-bath the witness said would be the best means of protecting himself or steadying himself while stepping into the receptor. The door knob, the wit-

ness also said, was available and could be used for that purpose. The curtain slides on rings, and if a person wished he could take hold of the curtain itself, which was treated in some way to make it water proof. The floor of the bath was composed of tiling. The base or receptor of the showerbath was porcelain. The witness did not observe anything about that base that was difficult to stand upon or that would be more difficult than any other porcelain slab would be to stand upon, and could not see anything dangerous about it. Neither could he conceive of any improvement that could be made. So far as he could see there was every safeguard, every facility that a person would want in order to protect himself and keep from falling. The metal handle was fixed against the slab. (Tr., pp. 456-459.)

Although the witness was very positive in his opinions as to the safety of the shower-bath, there was nothing in his testimony to show that he was specially qualified to give expert testimony in such matters, or that his testimony had any greater value than the opinion of the ordinary non-expert person.

On cross-examination Mr. Relf testified that he had been connected with the Great Northern Pacific Steamship Company since January, 1915, and had also acted as General Claim Agent of the railroad lines that were affiliated with the steamship company. He had made no particular examination of the shower-bath in question until after the accident occurred. (Tr., pp. 459-460.) The rim of the receptor or basin was three and a half inches in width at the bottom

and the inside of the rim sloped one-half inch so that at the top the thickness of the rim would be about three inches. The inside of the rim sloped three-eighths of an inch instead of one-half an inch. The basin inside at the bottom would be twenty-three inches square. The waste in the middle was about three inches in diameter. There was a small metal cap with holes in it through which the water ran. The curtain was sustained from the rod above at the entrance to the shower. That was one of the purposes of the rod. The witness thought that one of the uses for which this rod was intended was for the purpose of catching hold of by a person entering the shower-bath. The purpose of the pipes was the conveyance of water into the shower, but they could be used for the purpose of being got hold of by anyone entering the bath. The witness said he would not want to use the hot one. He also said that he did not know as a matter of fact, and had never heard that a Mr. Stuart of Stockton had been thrown against the hot water pipe and severely burned. He had never received any report of any such accident, and had never heard of it, but had heard that one man, he did not know who he was, but some man at some time, had been burned by coming in contact with the hot pipe. He did not know whether it was this particular bath, and he had never received a report on it. He thought that a person could catch hold of the curtain as a measure of precaution so as to prevent falling. The door knob he would say was about 32 or 34 inches from the floor and was there for the purpose of opening the door and

he did not suppose its primary purpose was that of being got hold of by anyone entering the bath. The curtain rod was generally for the use of running a curtain on it. (Tr., pp. 459-465.)

S. W. Jamieson, a resident of Glendale, California, also testified by deposition for the libellees. He said on direct examination that he was a passenger on the "Great Northern" at the time Mr. Hutchins was hurt and had occasion to use the shower bath on the voyage. The bath-room was off the passageway that runs lengthwise of the ship. There was a door that led into the bath-room, and there was a very high threshhold that you had to step over to get into it. In the bath-room were two shower-baths, some washstands and places for towels, etc. The shower-baths were two compartments about the ordinary size of a shower-bath, with overhead showers, curtains, a valve at one side for mixing the water at the proper temperature or turning it on or off, and on the open side there was a sill raised from the main floor of the bath-room approximately five inches. The three walls of the shower were of marble slabs and the bottom was of some sort of tile or chinaware. Between the two shower baths was a door which led into some sort of heating arrangement for the water supply. The light in the bath-room was an overhead light, which, owing to the light colored paint, diffused all over. So far as facilities for taking hold of to prevent slipping or falling, he could not say whether or not there was anything further than the valve on the pipes, that being all he had occasion to use. On going into the bath a

person could steady himself by taking hold of the edge of the marble slab at the right hand of the picture. (See Exhibit No. 3, Tr., p. 545.) The witness himself did not slip or fall in using the bath. (Tr., pp. 477-481.)

On cross-examination Mr. Jamieson testified that on that trip he used the shower-bath, as he remembered it, at least three times on the way over, and, as he recollected it, he never had occasion to catch hold of anything on using the shower-bath. The rod referred to was a rod on which the curtain ran that shut in the bath from the room itself, and there was a curtain on the rod. He used the valve in turning on the water. That was the only purpose he used it for, turning on or turning off the water, and changing the temperature. (Tr., pp. 481-483.)

Charles Wall, Chief Officer of the Great Northern, also testified by deposition for the libellees. He stated on direct examination that he knew the condition of the shower-bath on the "C" deck on February 18, 1916. He described the shower-bath substantially as shown by the photographs. It would be practical for a person using the bath to hold on to the door knob if he desired to do so, and it would be possible to hold on to the edge of the marble slab. He thought that nine men out of ten, upon stepping into the shower would do that without any conscious effort. The water pipes he said were about five feet high from the floor and quite easy to be taken hold of in entering the bath. In the case of a man losing his balance he thought it would be the first thing he would catch hold of with his left hand. *There was no rubber mat on the bot-*

tom of the shower-bath so far as he saw. He did not know of a rubber mat ever being used in those shower baths. He had never found anything wrong with this bath, never had made any report concerning it, and never had noticed anything that led him to think that the bath was dangerous in any respect. (Tr., pp. 483-487.)

On cross-examination this witness said that he had no duties outside of inspection with reference to the bath-rooms. He made an inspection on February 18th. He remembered that positively, because it was done every day. He remembered doing it particularly on that day. He took a look in the shower-bath; opened the door and looked in. He might have talked this matter over with the Captain at different times; he remembered that he had. *A person holding on to the slab would have to extend his fingers on one side and his thumb on the other, and he could not very well get a grip on any place on the slab.* If his foot should slip out from under him and he should fall backwards, his hand might slide right off the slab, although the witness thought he could hold on. The slab was of smooth marble. If a person falling should catch hold of the hot water pipe, the witness imagined it would scald and burn his hands, although in standing on the outside and stepping in the witness said it would be natural to catch the first pipe at hand. The three pipes were close against the wall, but there was space enough to get your hand in and around one pipe. The witness's idea was that if a person stepping into the bath should lose his balance and fall over backwards

he could reach out and catch hold of the pipe. The pipes were probably about 12 to 15 inches from the edge of the slab. The door knob might save a person losing his balance, by grabbing it. It might turn, the witness did not know, that was a possibility. (Tr., pp. 489-493.)

W. B. Lowenthal, called on behalf of the libellees, testified by deposition, and said on cross-examination that he was a passenger on the "Great Northern" on its voyage from San Francisco to Honolulu, commencing February 14, 1916. He used the public shower-bath of the "C" deck every morning, and had no difficulty. He thought the marble slab would assist a person in supporting himself, but *did not think that the water pipes would be of any advantage.* He had occasion to hold on to the rod upon which the curtain hung. (Tr., pp. 492-502.) On cross-examination he said that the slab he spoke of formed one side of the shower-bath, and a person could only lay his hand along the slab with his fingers on one side and his thumb on the other, and that *there was no way of getting a grip on the slab.* If a person entering the bath should lay his hand along the slab and fall off backwards his hand would probably slip off of the smooth surface of the slab. He thought that it would be the natural and only thing that could happen because there was no grip there to hold on to. The witness did not hold on to the pipes in the bathroom at all. (Tr., pp. 502, 503.)

Sam B. Stoy, of San Francisco, testifying by deposition, said that on the trip in question he was a passenger

on the vessel and used the shower baths every day, sometimes twice a day. He said he had no difficulty with the equipment. His memory was that there was a sort of bowl to stand in of porcelain at the bottom, and when he took his shower in case the ship lurched he took hold of the pole on which the curtain was suspended, or the faucet, or a handle, as he remembered it, that was in the back of the bath compartment. He did not recall any difficulty experienced by him in taking a shower bath on February 18th, 1916. (Tr., pp. 533, 534.)

The witness, Barney R. Simons, a dentist of Philadelphia, whose testimony has already been referred to on another point, testifying by deposition, on direct examination said that he had practiced his profession as a dentist for 24 years. He had taken a preparatory course of medicine, but had never completed it. He described the shower bath and basin about as the other witnesses did. (Tr., pp. 562-566.) He said that he had occasion to investigate showers and porcelain basins of that type because he intended to put them in his cottage in Massachusetts. The shower, as constructed on the "Great Northern" was the stock basin in every particular. He would say that the slope was only such as would carry and drain off the water. The floor of the bathroom was made of small tile blocks, and he would say it was in good repair. He used the shower himself for two or three mornings prior to the accident and saw nothing wrong with the shower or the basin or the floor. It struck him as an admirable shower. The place was well lit up. He

should say the room was clean and he saw no evidence of any soap used. The floor between the passage of the two showers was wet as a result of people stepping out from under the shower with the water dripping from their persons, but he would not call that dirty. So far as he knew the place was clean. *The tile floor was not covered with a rubber mat.* He said that he had hospital and medical experience and was familiar with principles of sanitation, and that he had considered and studied carefully matters of infection or sanitation. He regarded principles of sanitation as more important on a steamship than he would in his home, because of peculiar conditions. He had traveled on a great many steamers but he did not remember seeing rubber mats on any of them, and did not remember hearing of anyone falling in the bath. He did not regard the use of rubber mats on the floor of a bathroom on a steamship such as the "Great Northern" as sanitary as a tile floor. He said he should say that *if there were mats of a good size in proportion to the size of the room they would help considerably,* but smaller mats would provide practically no protection. He regarded the equipment of the shower bath room on the "Great Northern", including its basins and general appurtenances, as first class. (Tr., pp. 566-573.) Shortly after the accident of Mr. Hutchins he took a bath himself and did not find anything unusual about it, except that it was rough and he had to be careful. In his opinion, there was no more slope in the basin than was reasonably necessary for drainage, and, in his opinion, the general

conditions of the showers and of the bath room were reasonably safe. (Tr., pp. 579-581.)

On cross-examination Mr. Simons testified that the basin had a glazed porcelain surface, and the flooring in the passageway was glazed tile. (Tr., p. 581.) Although he testified on direct examination that he had never seen rubber mats, he qualified this on cross-examination by saying that he had seen rubber mats in bathrooms on ships, but did not know that he remembered seeing on first-class steamers, such as the "Great Northern," bathrooms tiled in rubber tile. The rear wall of the bathroom in question was of polished marble. *As to the rubber curtains they would not have saved Mr. Hutchins even if he had grasped them.* (Tr., pp. 582-583.) As to the use of rubber mats, where, on shipboard, rough weather was to be expected, the question of safety would be more important than the question of sanitation. *The presence or absence of a handle was absolutely immaterial as this accident happened, as Mr. Hutchins never could have reached it if it had been there.* (Tr., pp. 586-587.) On redirect examination the witness said that *there was no rubber mat in the small hallway between the two showers, no rubber mat in the shower bath, and no rubber mat in any part of the lobby.* (Tr., p. 589.)

The testimony of Mr. Simons as to the manner in which the shower bath was constructed and equipped did not vary from the rest of the testimony in the case upon these points. His opinions were not based upon any particular expert knowledge, but were only such as any person who has traveled on vessels and

who has been in the habit of using the baths provided, might give. Even though this witness testified more favorably for the libellees than any other witness in the case, except, of course, the officers of the ship, the impression left after reading the whole of his evidence is that the shower bath was slippery and dangerous, and that the highest degree of care had not been exercised in attempting to make it safe.

The libellant in rebuttal called Alfred Hackett. On direct-examination Mr. Hackett testified that he was chief steward of the steamship "Sierra" of the Oceanic Steamship Company, plying between San Francisco and Sydney, Australia, via Honolulu. He had been thirty years with the Oceanic Steamship Company, and during that period had occupied the positions of storekeeper, second steward and chief steward, having been chief steward for 18 or 19 years. He was familiar with the internal arrangements of the vessels of the Oceanic Steamship Company with reference to bathing facilities for passengers. For eight years he had been a steward on board the steamship "Sonoma," and had also been on the steamships "Alameda" and "Australia." In referring to the steamers of the Oceanic line that were equipped with shower baths the witness said that the shower baths were about 36 inches square, of marble, and *enclosed with a wooden latticed door. There was a wooden grating on the bottom to protect passengers from slipping, and outside in the recess mats or bath towels were also put for the safety of the passengers to stop them from slipping. The bath-rooms had rails which*

passengers could hang on and always a bath mat or a wooden grating to protect them so that they would not slip. The same precautions were used in all the bathrooms. (Tr., pp. 345-348.) Two of the vessels of the Oceanic line were so equipped with shower rooms, the "Sierra" and the "Sonoma." These were the vessels where he had observed shower bath construction because *he had charge of them.* He was *superintendent of that department, and that came to him naturally in the steward's department.* The "Ventura" was a sister ship in all respects to the "Sierra" and "Sonoma," and he had also been aboard the "Ventura." In the other vessels referred to by him the shower was over the ordinary white procelain tub. He knew that everything was satisfactory so far as his ships were concerned. There had never been any question or trouble. (Tr., pp. 348-352.) Upon examining the photographs, Claimant's Exhibits Nos. 1, 2 and 3 (Tr., pp. 543-545), the witness said that the shower baths on the vessels of the Oceanic line were a facsimile, the only difference being provisions for the safety of the passengers. On the Oceanic vessels a *wooden grating was kept on top of the marble and on the outside in the partition a wooden grating was also kept and there was a bath towel put so that a passenger stepping out* from the bath into the dressing compartment *would not be liable to slip. There was a handle to hold on to right in the bath, outside the bath-room, where one comes out from the shower, and there was a lattice door, which made it impossible for the passenger in case of bad weather, to be thrown*

out of the bath-room. The witness said that in his opinion and experience a bath of the description shown by the photographs without any protection for a passenger, that is, without any wood grating or a foot bath towel to stand on, renders a passenger liable to slip. There was evidently no handle or anything a passenger could get hold of according to the photographs. His company protected their passengers by having a wooden grating bath mat, and also on the outside dressing room a platform of wood with a bath towel on it to prevent the passenger from slipping while he was wiping himself and dressing. *The bath-room, as represented by, and in the condition shown by the photographs, was certainly not safe.* (Tr., pp. 354-357.)

On cross-examination Mr. Hackett said that these wooden gratings had been used on the floors ever since he knew the Oceanic Steamship Company. He did not know of any time when passengers used those shower baths without this grating or flooring. There was a man kept to look after that and he was cautioned to keep them in their places. These gratings were always down. In response to a question by the Court Mr. Hackett said that the wooden grating fitted in the basin and was there for the safety of the passenger. The basin was of marble and sometimes if a person put his foot in salt water he would slip. It could not be helped, particularly in bad weather. They also had on the Oceanic vessels named a wooden door that closed and protected the passenger from falling out in case the ship pitched. When the

passenger stepped from the basin into the dressing room there was another long grating, and on that grating was a bath towel or a bath mat to prevent him from slipping. Their bath room floors were of marble also, and that was the reason these things were used. These devices had been on the vessel 16 years. (Tr., pp. 357-359.)

This witness's testimony shows that on vessels of the Oceanic Steamship Company, on the same run as the "Great Northern," that is, between San Francisco and Honolulu, where the shower bath arrangement was practically the same as on the "Great Northern," gratings were provided in the basin itself and upon the floor of the compartment outside of the basin, that the bathrooms had rails which the passengers could hang on to, and that there was a lattice door that would prevent a passenger from falling out of the compartment in case he slipped. Had there been such a railing on the shower bath of the "Great Northern," or had the basin or flooring been equipped with gratings or mats, the accident in all probability never would have happened. Had there been a latticed door that could have been closed as soon as Mr. Hutchins entered the compartment, he could not have fallen, as it is shown he did in this case, clear across the passage way into the shower bath compartment on the other side. Yet, in spite of these facts, the libellees contend they used the highest degree of care and constructed and equipped their shower baths in a careful manner and without negligence.

Considering all of the evidence in the case relative to the general construction and equipment of the

bathroom, including the photographs, having in mind the glazed porcelain surface of the basin, the smooth, polished marble slabs at the side, the glazed tile floor, the lack of rails, the lack of a latticed door, and the lack of mats of rubber or other material that would give a foothold, the conclusion that the shower bath was dangerous conforms with the weight of the evidence, and the absurd opinions of the officers, under the circumstances, that Mr. Hutchins might have saved himself by grasping a curtain rod over six feet high and behind him, or by grasping the pipes on the marble slab, one of which carried hot water and all of which were close to the slab, or by grasping the highly polished marble slab at his right, do not weaken this conclusion. None of these instrumentalities were constructed for any such purpose and no one but an interested witness would make the claims for them and suggest the uses that the officers of the ship who testified in this case did. Viewing the evidence as a whole the appellees not only have not sustained the burden, placed upon them by the law, of showing that they exercised a high degree of care and furnished a safe shower bath for the use of the passengers, but the evidence affirmatively shows that they did not.

The Court, in its opinion, found that there was no mat of any kind on the bottom of the basin in which it was necessary to stand in order to take a shower bath, nothing but the bottom of the basin itself. The Court also held that there was a *sharp conflict* in the evidence as to whether the placing of a mat or anything else over the bottom of the basin would have

added anything towards making it less slippery or rendering it less likely that one using the place to take a bath would fall on account of the bottom being slippery. (Tr., p. 658.) The Court is entirely wrong in this conclusion. There is no such sharp conflict in the evidence and even the libellees' witness Simons admitted that a mat would have rendered the shower bath less dangerous. Only one witness on behalf of the libellees, the captain of the ship, testified in substance that, in his opinion, rubber or wooden mats would be more slippery than the glazed porcelain bowls. The Court below entirely ignored the testimony of the one disinterested witness, who was qualified to speak on the subject, namely, Chief Steward Hackett, of the steamship "Sierra," whose testimony is referred to above.

The lower court seemed to have been carried away with the ideas of the officers of the ship that all a person had to do to be entirely safe was either to hold to the curtain rod, or the polished marble slab, or the small handle at the rear of the bathroom (Tr., p. 660), and disregarded all the other evidence in the case.

As a great deal of the evidence was by deposition the findings and conclusions of the lower court are not in any manner binding upon this appeal, and this court is warranted, under the authorities referred to later, in reviewing the evidence and in forming its own conclusions and opinions uninfluenced by the conclusions of the trial judge.

(b) *As to Whether the Bath Was Equipped With a Handle.*

A great deal of the testimony in the case was directed to the question as to whether at the time of the accident the shower bath was equipped with a small handle that appears in the center of the photographs, Claimant's Exhibits Nos. 2 and 3 (Tr., pp. 544-545). Upon this point there really was a sharp conflict in the testimony. Assuming that the handle was there, which was the assumption indulged in by Mr. Hackett in his testimony, the great weight of the evidence still shows that the libellees did not exercise the degree of care required of them by the law in constructing and equipping their shower baths. If, as a matter of fact, the handle was not there at the time of the accident, it merely indicates on the part of the libellees still greater negligence. The handle was not there at the time the vessel was built, and was added either shortly before or shortly after the accident occurred.

Mr. Hutchins, the libellant, testified on direct-examination, that the handle was not there when he was injured. (Tr., pp. 76-77, 79.) Subsequent to the time of the accident, and about the middle of March, after the "Great Northern" had made another trip to Honolulu, he went on board the vessel and visited the bathroom. At that time there was no handle or projection there. He was positive of that. On the next trip of the vessel to Honolulu Mr. Hutchins also looked at the bathroom in company with one of the stewards of the vessel, Lefebre by name, and on

this occasion there was no handle there. (Tr., pp. 96-97.)

On cross-examination Mr. Hutchins said that he saw the bathroom three times after the accident. The first time was while he was on the ship, and that was out of curiosity; the next time was because he had complained to Mr. Stone, the chief agent of the company, who was on board, that he was maintaining a death trap, and when the ship came back again he went in to see whether it had been changed or not, and when he went the third time it was also for that purpose. Up to the time of the third inspection there was no handle there. (Tr., pp. 127-128.) The handle was not there at the time he fell, it was not there at the time of his second visit, and it was not there at the time of the third visit. That is the absolute, positive statement of Mr. Hutchins. (Tr., pp. 165-166.)

The witness, Francis G. Lefebre, who was employed on the steamship "Great Northern" at the time of the accident, as a waiter, and who worked at the chief engineer's table, for Mr. Morris, remembered the occasion of the accident to Mr. Hutchins and testified on behalf of the libellant. On direct-examination he said that on the occasion of the next trip of the vessel to Honolulu Mr. Hutchins came aboard the steamship and that he, Lefebre, accompanied Mr. Hutchins to the bathroom where the accident happened at Mr. Hutchins' request. At that time there was no handle on the back wall of the shower bath. On the same day, and right after that he went to the chief engineer's room (Mr. Morris) and told him that Mr. Hutchins had come down to the boat. Morris

asked what for, to which Lefebre replied: "He wants to see the shower bath, to see for himself that there was no handle." Mr. Morris said: "There must be one," and Lefebre replied: "Mr. Morris, Mr. Hutchins and I just looked and we did not see any." Mr. Morris again said: "There must be one." Lefebre said: "If you don't believe me, come and see." Morris then went with Lefebre to the bathroom and Lefebre showed him that there was no handle there. (Tr., pp. 594-598.)

On cross-examination Mr. Lefebre testified that he had been asked to testify in the case by Mr. Hutchins and that he phoned Mr. Morris (the chief engineer of the vessel) that he was going to testify. Morris said to him: "It is up to you, but I hope you will only tell the truth." Lefebre replied: "Certainly, Mr. Morris, I will tell the truth." Morris then said: "You know very well the handles were there four months before the accident happened." Lefebre replied: "Mr. Morris, I give you my word that the handles were not there, for Mr. Hutchins and I went into the shower bath and looked for them." (Tr., pp. 601-602.)

On redirect-examination Lefebre said that Morris told him that if he testified that way it might drive him to jail (Tr., p. 604), and on recross-examination said that Morris said to him: "Francis, it is up to you, if you go up in this case you may get yourself in trouble." (Tr., pp. 604-605.)

H. E. Westcott, purchasing agent for the City and County of Honolulu, who testified for the libellant, said that the latter part of March, 1916, he visited

the bathrooms on board the steamship "Great Northern" in company with Mr. Bicknell, the City and County Auditor. From information he had received, he took the opportunity and pains to see whether or not the handle was in the bathroom where Mr. Hutchins sustained his injury. The handle was not there at the time of his visit. (Tr., pp. 204-207, 208-212, 261.)

W. H. Metzler, special agent of the Great Northern Pacific Steamship Company, on the other hand, testifying for the libellees, said that on the day of the accident he visited the shower baths on the "Great Northern" and that the "grab irons," as he called them, were then in each compartment. (Tr., p. 212.) He went to the bathrooms for the purpose of examining the equipment to see if there were any defects. He said that it was his duty to investigate all personal injuries and accidents. He did not know the exact date when the "grab handles" were put in the shower compartments, but, as he remembered it, it was two trips before the one Mr. Hutchins made. (Tr., pp. 212-217.)

On cross-examination Mr. Metzler said that on the day of the accident, and after it happened, he did not remember saying anything to the captain about the grab handles. Upon his attention being called to his deposition that had previously been taken, in which he had answered: "The captain and I talked it over that day—the day of the accident," he said: "I think we did; yes, we both talked about the grab irons, on the same day the accident occurred." (Tr., pp. 217-219.) On cross-examination Mr. Metzler was also

asked whether he knew a man by the name of Lefebre, and at first he said he did not, and never did know him that he recollected. He was then shown his own card containing the words: "W. P. Metzler, Pier No. 7, Frisco, Cal., Special Agent," having on the reverse side the words, "Please call at my office as soon as possible" (Tr., p. 50), and was asked whether he left that card for Lefebre. He said: "Yes" he did, and that Lefebre was a steward on the boat. He left the card at the Oakland Hotel, asking Lefebre to call at the office so that he might question him regarding the accident. He understood that Lefebre would testify that there was no grab iron in the shower. (Tr., pp. 219-221.) Mr. Metzler had been in the employ of the Great Northern Pacific Steamship Company since January, 1914. He judged the grab irons to be about four and a half or five feet from the floor. He had no idea when the photographs were taken and did not know that they were not taken until after the accident. (Tr., pp. 227-228.)

J. B. Morris, chief engineer of the "Great Northern," also testified for the libellees relative to the handle. The grab iron was in the shower bath on the day that Mr. Hutchins sustained his accident. He took a look at it the following morning. He had been told by Mr. Hutchins the evening before that he had slipped and hurt his shoulder, and he just took a look at the place. He knew there were handles there. Upon being asked whether he looked for them at that time he said *it was not necessary* to look at them, because they had been put in some time before. They

were put in there on the 24th of January, and *that matter was fixed in his mind in looking up the bills afterwards,* as he remembered it. (Tr., pp. 240-243.) He did not at any time, in Honolulu, or elsewhere, go with Lafebre to the shower room for the purpose of ascertaining whether or not any handles were there, or have any conversation with Lefebre about that matter. (Tr., pp. 250, 304-305.) Mr. Morris further testified that shortly before Lefebre testified in the case in October, 1916, Lefebre called him up by telephone and told him that Mr. Hutchins had gotten him a position at Del Monte during the summer and had asked him to testify as to showing Mr. Hutchins the shower on the "Great Northern." Lefebre also said that he had always liked Morris and would not want to testify in any way to hurt him. Morris asked how that was going to hurt. Lefebre replied that the way he was to testify was that he took Morris to the shower and showed him there were no grab handles there and said he did not like to do that. Morris told him that whatever he did to testify to the truth and that if he didn't he was liable to go to jail for it. Mr. Morris also denied that the conversation between himself and Lefebre was such as Lefebre had testified to. (Tr., pp. 304-308.) Further, Mr. Morris testified that he knew the shower bath grab iron handles were put on the "Great Northern" about January 24th, 1916, from the office files of the marine superintendent, and that he knew it was before Mr. Hutchins' trip by the files in the office. Upon being further examined by counsel for the libellees, and upon being asked

a direct question, he said that on that trip he observed that the handles were in their places. (Tr., pp. 309-310.)

On cross-examination Mr. Morris testified that he did not know whether Mr. Hutchins was aboard the "Great Northern" in April of 1916, and did not remember whether Lefebre was on board the vessel about that time. He was not sure whether Lefebre was his steward at that time, but did remember that he did not have such a conversation as Lefebre testified to. He did not know who his steward was in April, 1916, when the steamship was in Honolulu. (Tr., pp. 314-315.) In the ordinary bathtub where there is a shower over it, the handles are on the *side* of the wall, and some of them are a foot long, sometimes made of wood and sometimes of brass and plated. They project about two and a half inches. *The handle in the shower room of the "Great Northern" he should say was about five inches long.* (Tr., pp. 315-316.)

A. Ahman, master of the steamship "Great Northern," testifying on behalf of the libellees, said, in describing the shower bath, that directly on the wall was a grab handle or grab iron at the time Mr. Hutchins fell. He fixed this from the fact that one of the small tables from the veranda pulled loose from the deck and he had requisitioned to have it properly fixed in San Francisco that voyage, which was the beginning of January, and also requisitioned for some other alterations and repairs on the boat. Simon was doing the work and as the captain was passing the

bath-room with Simon, Simon said he had a man working to put up grab irons, so the captain went in there and saw a man putting them up. This was on the first trip after New Years. Mr. Ahman did not exactly recollect when this was, but knew it was the Christmas trip when the table was fastened, and the grab irons were put in at the same time, because Mr. Simon called his attention to it. He thought this must have been one or two trips before Mr. Hutchins was a passenger. The grab irons were not on the boat originally, as she came from the shipbuilders, but they were put on in San Francisco. He did not know when the photographs in evidence were taken. He was not in the particular shower bath where Mr. Hutchins met with his accident, on the morning of February 18th, 1916, or the night before, or two days before. He did not know whether he was there at all on that particular trip. (Tr., pp. 270-273, 281.)

It is clear from this evidence that Captain Ahman has no independent recollection as to the time when the handles were placed in the shower baths, but only knows that they were placed there at the time the workman was putting them on, whenever that was.

Joseph Gould, also called on behalf of the libellees, testified on direct-examination that he was a steward on the "Great Northern" at the time Mr. Hutchins was a passenger and that he was acquainted with the shower bath. The photographs, Claimant's Exhibits Nos. 1, 2 and 3 (Tr., pp. 543-545), correctly represented the shower room on "C" deck, as it was during Mr. Hutchins' trip. The handle was in the shower

room at that time. He saw it himself. (Tr., pp. 292-293.) In attempting to explain why he knew this, the witness was not very clear. (Tr., pp. 293-294.) All he appeared to know was that at some time he had seen a man drilling the holes for handles on "B" deck, and that he went to "C" deck where the shower bath in question was, to see if his mate was ready for sea, and his mate's were all finished up, and Gould's were not put on until the following day.

On cross-examination Joseph Gould said that he was not in the particular shower bath either on the morning of February 18th, 1916, or on the morning of the 19th, or on the 20th, or on the 21st. He did not know when the photographs were taken. It was either in April or May, 1916, somewhere around there. After the accident and after the ship had been taken off the run he had a conversation with Mr. Relf, the claim agent, about this particular shower bath on Deck "C," at Portland, Oregon. That was sometime in May, 1916. The witness himself had charge of the showers on "B" deck. (Tr., pp. 295-298.)

Thomas S. Mills, the chief steward of the "Great Northern," testified for the libellees, and on direct-examination said that he had been holding such position since August 10th, 1915. He personally knew the shower compartment on "C" deck of the "Great Northern" and identified the photographs introduced in evidence. He knew the handle was in the compartment before the ship sailed on which Mr. Hutchins was a passenger. He had the requisitions for it, checked the articles up before they sailed, and in-

spected the shower room after the handles were put on. The requisition was put in on the 20th of January, 1916, and the handles were finished on the morning of the 25th. He saw the work being done. After the work was done a bill was rendered that the witness O. K.'d. (Tr., pp. 324-328.) The requisition and bill were introduced in evidence and marked Libellees Exhibit 1 (Tr., pp. 50-62).

It is apparent that the witness Mills depended largely upon his requisitions and the bills rendered, in giving his testimony. The requisition for "Grab bars in all shower baths," dated January 20th, 1916, is found on page 59 of the Transcript. The item "10 nickel plated pulls, $7.10," on page 55 of the Transcript, is the charge for the handles. (Tr., p. 328.) This charge does not indicate where the pulls were used. The statement "Grab bars in all shower baths" on page 53 of the Transcript appears to be merely a repetition in the bill of Muir and Symon of the language of the requisition, and does not throw any light upon the question as to whether a hand grab was actually fastened in the shower bath in question.

On cross-examination Mr. Mills testified that he was in the shower bath compartment where the accident happened to Mr. Hutchins on the morning of February 18th, at about 11:00 o'clock for inspection. There were six public shower bath compartments on the ship. These were all inspected, as well as the baths in the second cabin. The inspection was made with the captain. Not much time was spent going through the whole ship and the inspectors did not lie

on the job. A regular morning inspection was made on the steamship "Great Northern" by the captain and the witness Mills, of the whole ship—of the saloon, the bath places, and the staterooms; such inspection might take twenty minutes or it might take forty minutes. The witness said that he went to these baths six or seven times a day to make inspections, but that he might have been in this particular bath-room only three times on February 18th, 1916. Tr., pp. 328-331.)

Dr. Robert J. McAdory, who was the ship's surgeon at the time of the accident, also testified on behalf of the libellees concerning the handle. He said on direct-examination that the grab handle was there on that day. (Tr., p. 383.) On cross-examination he said that he would not undertake to swear that he saw the handle in the back of the bath on the morning of the injury. He said, however, that he examined it the same day, but he did not know what time, and that nobody was with him. He examined it, he said, to see if there was any way by which Mr. Hutchins could have supported himself. Upon being asked how long he was in making that examination, he said that a glance was all that was necessary; that he went in and looked at the compartment. It was just a matter of a glance. (Tr., pp. 392, 393, 397.)

Walter A. Scott, the photographer who made Claimant's Exhibits 1, 2 and 3 (Tr., pp. 543-545), said that these photographs were taken on May 1st, 1916, and that they correctly represented the bath-room in question at that time. (Tr., pp. 430-432.)

S. W. Jamieson, a resident of Glendale, California, also testified on behalf of the libellees. It does not appear he was in any way connected with the vessel either as an officer or otherwise. He was a passenger on the "Great Northern" at the time Mr. Hutchins was hurt, and he stated on direct-examination that he could not state whether there was any facility for taking hold of to prevent slipping in the bathroom in question other than the valve. (Tr., pp. 477-479.)

On cross-examination he said that he did not notice the handle that was shown on the photograph at all, and could not say whether it was or was not there at the time of the accident. He did not particularly notice it. He did not notice that handle either on the trip going or on the trip returning. He used the shower bath about three times on the trip down and also used it on the return trip. (Tr., pp. 481-483.)

This testimony shows either one of two things: that the handle was not there at the time of the accident, which theory conforms to the great weight of the evidence of all of the disinterested witnesses in the case, or, if it was there, it was so inconspicuous as to be valueless in case of emergency.

Charles Wall, chief officer of the "Great Northern," called by the libellees, on direct-examination, and testifying with reference to the photographs, stated that in February, 1916, the handle, as shown on the photographs, was in the shower bath. The handle was made of heavy bronze or brass, and fastened on to the rear marble slab with heavy screws. (Tr., pp. 485-486.) On cross-examination he said that he had

never told anybody the handle was there on February 18th, 1916, before he heard of this case. It was there, he said, the day before the accident.

The record is absolutely silent as to how this witness could have had impressed upon his mind such a minor fact as a handle being in a particular bath-room on a particular day.

W. B. Lowenthal, also a witness for the libellees, said on direct-examination that he was a resident of San Francisco and engaged in the grain and bean business. He was a passenger on the "Great Northern" from San Franciso to Honolulu on the trip commencing February 14th, 1916, and had occasion every morning to use the public shower bath on the "C" deck. He said that *to the best of his knowledge there was no rod or bar to hold on to in the shower.* There was just the three walls and a curtain in front, and he did not remember any hand hold on the marble slab at the back of the bath. (Tr., pp. 498-499.)

On cross-examination Mr. Lowenthal said that to the best of his recollection there was no hand grab or hold at the rear of the bath-room that he saw, and on recross-examination said that while in the bath he worked the handle on the pipe to turn on the water and should think he had an opportunity of observing all of the interior fittings of the shower bath. (Tr., pp. 503-504.)

Here is another disinterested witness wholly unconnected with the steamship Company, called on behalf of the libellees, whose testimony corroborates all of the testimony of the libellant and his witnesses to the

effect that there was no handle in the bath-room at the time of the accident.

William John Tomlin, also called on behalf of the libellees, testified on direct-examination, by deposition, that he was a shipfitter, connected with the firm of Muir & Symon, who were in the business of ship-fitting, ship-repairing and machine work. He stated that he put on the handles in the shower bath shown on the photographs, Claimant's Exhibits 1, 2 and 3 (Tr., pp. 543-545). By referring to his time cards he could tell the date. The entries on the time cards were in his own handwriting. The dates were January 24th and 25th, 1916. (Tr., pp. 512-515.) These time cards were introduced in evidence and marked "Claimant's Exhibits 5 and 6." (Tr., p. 548.)

On cross-examination Mr. Tomlin testified that he had a recollection of doing the work. He thought he did it on both ships, the "Great Northern" and the "Northern Pacific" too. He was pretty sure he did them all on the "Great Northern." He could not tell exactly the number of handles he put on the showers. He thought it was just putting on the handles on all the showers. The letters on the card "G. N. S. S." meant "Great Northern Steamship," and "N. P. S. S.," "Northern Pacific Steamship," but he said the letters "N. P. S. S." under the words "Drilling marble in shower baths, using electric drill four hours," meant the Northern Pacific Steamship Company, but the steamship was the "Great Northern." He did not know why he had the letters "N. P. S. S.," which would be the "Northern Pacific Steamship," under-

neath. There must have been an error in putting down the name of the ship. *According to that record he drilled the holes in the marble on the "Northern Pacific Steamship."* He put grab irons on the "Northern Pacific Steamship," he said, but not on that date, because there must have been about a month elapsed. The "Great Northern" had them on first, because she was going to Honolulu. According to the record, however, he said he put a baker's oven (see Claimant's Exhibit No. 5, Tr., p. 548) on the "Northern Pacific" that same day. He would not say that was a mistake. *The letters "N. P. S. S." on the Exhibit were not in his handwriting. The letters "G. N. S. S." on Exhibit 5 were not in his handwriting.* He did not put them down at all. That had been added. He had no independent recollection of the day on which he did the work on the "Great Northern" except as he gathered it from the time cards (Tr., pp. 515-519.)

On redirect-examination Mr. Tomlin said, as to the size of the handles, *that inside they were about six inches,* and about nine inches over all. The middle was about an inch and a quarter wide by three-eighths of an inch thick. On recross-examination he said that the handles were put on the "Great Northern" before they were put on the "Northern Pacific," because he put them on the "Great Northern" before she went to Honolulu, and put on the others probably a month later. He would not say he put the handles on the "Great Northern" the first or second trip, he did not know the dates of sailing, but he knew they were not

on the first trip. He did not know when her first trip was and did not know when her second or third trips were, and could not say what trips she made, but he put on the handles. He put them on when she came back one trip from Honolulu. She must have made one trip previous to that. The baths were identical on the "Great Northern" and on the "Northern Pacific," and he could not tell from the photographs in evidence whether they represented the shower baths of the "Great Northern" or the shower baths of the "Northern Pacific." (Tr., pp. 519-523.)

It is clear that this witness relied entirely upon his time cards and had no independent recollection of having put on the handle in the bathroom in question. Exhibit 5 itself shows that the work on the baker's oven on January 24th, 1916, was on the "Northern Pacific" and not on the "Great Northern," and the letters "N. P. S. S." under the item of drilling marble in shower baths, the witness said meant "Northern Pacific Steamship" and that letters "G. N. S. S." meant "Great Northern Steamship." The witness first said that all of the entries on the time card were in his own handwriting, but on cross-examination had to admit that these letters had been added by someone else. The Court below laid great stress upon the evidence of this witness, but the facts show that he was probably mistaken, and point strongly to the work having been done on the "Northern Pacific" and not on the "Great Northern."

J. B. Switzer, a shipfitter and foreman employed by Muir & Symon, testifying on behalf of the libellees, said that in January, 1916, he was the outside foreman

of that firm. He said that he received a requisition from Mr. Muir, went down to the boat to see what was wanted, ordered the handles made at the foundry, and instructed Mr. Tomlin to drill the holes and have everything ready so that when the handles came they could be put on. He could not give the date any more than January, outside of what the time cards showed. *He was sure it was January on account of the dates of the time cards and the dates of the requisitions.* He also testified as to the size of the handles, corroborating in this regard the former witness, Tomlin. (Tr., pp. 523-525.)

On cross-examination Mr. Switzer said that the first he heard about these handles after they were put on was about three months before he testified (July 31st, 1916), and that he had talked the matter over with Mr. Relf. He had no independent recollection of the matter at all as to the time and went merely by the time cards. He relied on the time cards for the date. He had a requisition for the same work on the "Northern Pacific" and put in the handles there but had no recollection of the time he ordered those handles made. He believed the "Great Northern" was lying at Pier 25 and the "Northern Pacific" at Pier 11 or 9, he could not say which. (Tr., pp. 525-527.)

Katie Schneider, also testifying for the libellees by deposition, merely stated that she was bookkeeper for the firm of Muir & Symon during January, 1916, and made up the bills from the time cards handed in. She said that the letters "G. N. S. S." and "N. P. S. S." on the time cards, Claimant's Exhibits 5 and 6 (Tr., p.

46), *were in the handwriting of W. J. Tomlin,* although Mr. Tomlin said that these letters had been added by someone else, and were not in his handwriting. She said that the letters "N. P. S. S." were a mistake because the work was done on the "Great Northern." She, however, could have had no independent knowledge as to where the work was done, although she tries to identify it by reference to a contract number. (Tr., pp. 527-531.) In connection with her evidence the voucher, Claimant's Exhibit No. 7 (Tr., p. 549), was received in evidence, but this voucher was made up from the time cards.

On cross-examination Katie Schneider said that she was familiar with the handwriting of Mr. Tomlin and was certain that the letters on Claimant's Exhibit No. 5, "G. N. S. S." and "N. P. S. S." were in his handwriting, *and that if Tomlin testified that they were not he was absolutely mistaken.* (Tr., pp. 531-533.)

Samuel Symon, vice-president and general manager of the firm of Muir & Symon, also testified for the libellees in connection with the handles, but his whole testimony was based upon the time cards, requisitions and vouchers. (Tr., pp. 536-542.)

It is not strange that the witnesses who claimed to have furnished the handles, put them on, and kept the accounts concerning them, had to depend entirely upon the book entries and time cards. They could not be expected to have an independent recollection concerning the placing of a small handle in a single shower compartment several months prior to the time of testifying. The testimony for that reason is of little

weight, and this is particularly so because of its confusing and conflicting nature.

Sam B. Stoy, the manager of the London and Lancashire Fire Insurance Company at San Francisco, and not in any manner connected with the vessel, who was called as a witness for the libellees, testified on cross-examination that the claims agent of the steamship company, about a week before Mr. Stoy testified, on July 31st, 1916, showed him a photograph of the shower bath of the "Great Northern." That photograph showed a handle affixed to the wall in the back part of the shower, and Mr. Stoy thought he mentioned that fact, or asked the question if it was there at the time he was on the trip when Mr. Hutchins was injured, *because his memory was not clear as to that,* as it was his habit when the ship lurched a little to reach up, as he was very tall, and grab the curtain pole. (Tr., pp. 535-536.)

All of the disinterested witnesses in the case either swear positively that the handle was not in place at the time of the accident or express doubt as to its being there.

Barney R. Simons, the dentist of Philadelphia, an apparently disinterested witness, who testified on behalf of the libellees, and who was a passenger at the time Mr. Hutchins was injured, on direct-examination also said that he did not remember seeing any handle in the shower and he did not think there was one there. There might have been, but he did not remember seeing it. (Tr., pp. 577-578.) On cross-examination Mr. Simons was more positive, and said

there was no handle there (Tr., p. 582), and further (Tr., p. 584), that he did not recall seeing any handle there.

The court below laid great stress upon the fact that the officers of the ship swore that the handle was there at the time of the accident, and still greater stress upon the time cards, requisitions and accounts and the evidence of Mr. Tomlin, Mr. Switzer, Katie Schneider, Chief Steward Mills and Samuel Symon, relating to the same (Tr., pp. 654-656), but, as has been pointed out, all of this evidence depends upon the accuracy of the entries and whether they applied to the "Great Northern," and these questions are left very much in doubt. Furthermore, this evidence has little weight when considering the actual fact involved, namely, whether a handle was in the bathroom in question on the date of the accident. Even if there had been no confusion in the accounts, it is still highly probable, in view of all the other evidence in the case, that through inadvertence a handle had not been placed in the bathroom in question at the time of the accident. The trial judge found that Mr. Sam B. Stoy swore positively that the hand-hold was on the wall of the shower bath compartment at the time Mr. Hutchins fell and was injured. (Tr., pp. 656-657.) As we have just shown, Mr. Stoy gave no such evidence, but, on the contrary, expressed considerable doubt as to whether the handle was there at the time. The court wholly misconceived the effect of Mr. Stoy's testimony.

The trial judge also in his opinion stated that in order to find that the hand-hold was not there it would

be necessary to refuse to believe the positive, affirmative testimony of several disinterested, reputable witnesses, swearing positively that it was there. (Tr., p. 657.)

There is here again a misconception of the evidence. The disinterested witnesses did not swear positively that the handle was there. Some of them swore positively that it was not there, others that they did not see it, and others expressed doubt as to its existence. Mr. Westcott, purchasing agent of the City and County of Honolulu, a wholly disinterested witness, who, after the accident, went on the vessel for the express purpose of ascertaining whether a handle was in the shower bath, says it was not. The witness, Lefebre, says positively it was not. The passenger, Jamieson, says that he did not notice it. The disinterested witness, Lowenthal, says that he did not see a handle there. The disinterested witness Stoy expressed doubt as to whether the handle was there, and Simons, also a passenger, says there was no handle, or at least he did not see it.

All of this evidence, as well as the evidence of the libellant, who, after the accident made three separate trips to the shower bath for the purpose of examining the bathroom, and who says that on neither occasion was the handle there, was absolutely ignored by the court. He preferred rather, to rely upon the evidence of the interested officers of the vessel and the confusing and unsatisfactory documentary evidence made up of the time cards, requisitions and vouchers.

The fact of the existence or non-existence of the

handle in the shower bath at the time of the accident has not the weight that libellees claim for it. If it was there, the evidence is still overwhelming that the shower bath was dangerous, and that the libellees did not exercise that degree of care required of them in equipping it.

As much of the evidence relating to the handle was based on depositions, this Court, under the authorities which we will cite later, is fully warranted in ignoring the findings and conclusions of the court below and in forming its own opinion uninfluenced by the decision in the case.

3. THIS COURT MAY REVIEW ALL OF THE EVIDENCE AND DETERMINE THE MATTERS OF NEGLIGENCE AND LIABILITY IN ACCORDANCE WITH ITS OWN CONVICTIONS BASED ON THE RECORD.

An appeal in admiralty operates as a new trial and findings of fact, whether by the judge or a jury, are not binding on the appellate Court. Although the findings will not as a general rule be disregarded unless the Court is well satisfied that they are contrary to the evidence, yet the testimony may be weighed and considered by the appellate Court, and such Court may pass upon its inherent probabilities, and make proper allowance for bias, point of view, etc.

The A. G. Brower, 220 Fed. 648, 136 C. C. A. 256;
Munson S. S. Line vs. *Miramar S. S. Company,* 167 Fed. 960;
Levy vs. *The Thomas Melville,* 37 Fed. 271;

In the case of *The Columbian* (C. C. A.), 100 Fed. 991, where the cases were distinguished and the decree of the lower Court reversed on the facts, it was held that the Circuit Court of Appeals is not bound by a finding of fact made by the Court below in an admiralty case, but it is its duty, under the statute giving the right of appeal, to determine such question in accordance with the convictions formed from the record by the judges sitting on the appeal.

In *The Lucille,* 19 Wall. 74, the Supreme Court of the United States, in considering appeals from the District Courts to the Circuit Courts before the establishment of the Circuit Courts of Appeal, held that the judgment of the Court below should be regarded as though it had never been rendered, and that there should be a trial *de novo.*

See, also, *The Hesper,* 122 U. S. 226.

Where the testimony of the witnesses in a suit in admiralty is largely taken by deposition, as was the case in the present suit, there is not the same presumption in favor of a finding of fact as when based on the oral testimony of witnesses appearing before the Court, and it will be more readily reversed by the Appellate Court.

The Santa Rita, 176 Fed. 890, 893, 100 C. C. A. 360;
The Sapho, 94 Fed. 545, 36 C. C. A. 395;
The Glendale, 81 Fed. 633, 26 C. C. A. 50;
Hamburg-Amerikanische Paketfahrt Aktien Gesellschaft vs. *Gye,* 207 Fed. 247, 124 C. C. A. 517.

The reason of this rule is that where the testimony or a considerable portion of it is not taken in open Court, the Appellate Court has the same opportunity that the Court below had to judge of the value of the testimony. This is the reasoning followed by this Court in the case of *The C. S. Holmes,* 237 Fed. 785, 150 C. C. A. 529.

The decree below will be reversed where the testimony of several witnesses in a position to observe is opposed to the finding of the lower Court (*Wells* vs. *The Ann Caroline,* Fed. Cas. 17,389); where the District Judge has rejected the positive testimony of witnesses who were in the best position to know the facts (*The Albany,* 81 Fed. 966, 27 C. C. A. 28), and even where the trial judge has seen and heard some of the witnesses, especially when his findings, as in the case at bar, have been apparently induced in part by a misplacing of the testimony. (*The Gypsum Prince,* 67 Fed. 612, 14 C. C. A. 573.)

Where a Court of admiralty omits to find facts which are material to the issues in a case, although they are proved by the evidence, the case is reviewable by an Appellate Court, unaffected by any findings of the trial Court.

The Fullerton, 211 Fed. 833, 128 C. C. A. 359.

The Act of February 16th, 1875, relieving the Supreme Court of the United States of the necessity of deciding questions of fact in admiralty, does not apply to the Circuit Court of Appeals.

The State of California, 49 Fed. 172, 174, 175, 1 C. C. A. (9th Circuit) 224.

The last mentioned case also holds that on an appeal in admiralty the case is tried *de novo*.

As in the case now before this Court, much of the evidence was by deposition, and as the Court below in material matters made findings either directly contrary to the evidence or without any evidence to support them, this Court is fully warranted under the authorities in ignoring the findings and in drawing its own conclusions based on the record before it.

4. THE LEGAL LIABILITY OF THE APPELLEES BY REASON OF THE DANGEROUS NATURE OF THE SHOWER BATH.

(a) *The burden of proof and presumptions.*

Whatever the rule may be in the State Courts, it seems to be well settled in the Federal Courts, and particularly in admiralty cases, that where the evidence shows the happening of an accident to a passenger which, according to the ordinary course of things would not happen if proper care had been exercised, the presumption is against the carrier, and the burden is on him to relieve himself from it. The rule which requires an employee suing his employer for an injury to allege and prove the negligence upon which the right of recovery is based does not apply to a suit by a passenger against a common carrier, in which case *the fact of the injury while the passenger was himself in the exercise of due care raises a presumption of negligence on the part of the carrier, which casts upon it the burden of proving the exercise of proper care,*

and that it used all appliances readily obtainable, known to science, for the prevention of accidents.

Whitney vs. *N. Y., N. H. & H. R. Co.,* 102 Fed. 850, 43 C. C. A. 19.

See also:

Southern Pacific Company vs. *Cavin,* 144 Fed. 348, 75 C. C. A. 350;
N. Jersey St. Railway Co. vs. *Purdy,* 142 Fed. 955, 74 C. C. A. 125;
Sprague vs. *So. Ry. Co.,* 92 Fed. 59, 34 C. C. A. 207;
T. and P. Ry. Co. vs. *Gardner,* 114 Fed. 186, 52 C. C. A. 142;
The New World, 16 How. 469, 14 L. Ed. 1019;
The City of Panama, 101 U. S. 453, 25 L. Ed. 1061.

In the case of *City and Suburban Ry. Co.* vs. *Svedborg,* 20 App. (D. C.) 543, affirmed by the Supreme Court of the United States in 194 U. S. 201, 48 L. Ed. 935, it was held that the happening of an accident to a passenger while on or getting off a street railway car, which, in the usual and ordinary course of things would not happen with proper care, casts the burden upon the company in an action against it by a passenger to recover for injuries so received, of explaining the circumstances of the accident, in order to relieve it from liability. In that case the Court, at page 549 (20 App. D. C.), said:

"The plaintiff was a passenger on the defendant's car, and, as such, was entitled to the *highest degree of care and caution* on the part of the carrier for her protection against injury. It is true, to make out a *prima facie* case, the burden

of negligence on the part of the defendant, as the cause of the injury, was upon the plaintiff, but this burden is changed in the case of a passenger, by showing that the accident occurred that caused the injury to the plaintiff while the latter was a passenger. The burden of proof is then cast upon the defendant to explain the cause of the accident, and to show, if that be the defense that the plaintiff was negligent, and that her negligence caused or contributed to the production of the injury. *Inland & Seaboard Coasting Company* vs. *Tolson,* 139 U. S. 557."

See also:

Gleeson vs. *Va. Midland Ry. Co.,* 140 U. S. 435;
New Jersey R. & Transp. Co. vs. *Pollard,* 22 Wall. 341.

In a number of the State Courts the same rule has been followed, and it has been frequently held that a presumption of negligence will be indulged in as against the defendant from the fact that an accident happened to a passenger which according to the ordinary course of things would not have happened if proper care had been exercised, and that the burden was on the carrier to relieve himself from the presumption where the plaintiff was without fault.

Caldwell vs. *New Jersey Steamship Co.,* 47 N. Y. 282;
Indiana Union Traction Co. vs. *Scribner,* 93 N. E. 1014, 1021;
Le Banc vs. *Sweet,* 31 So. 766, 107 La. 355.

In the case last cited the Court said:

"Reduced to the simplest form the rule may be

> stated to be that the carrier is bound to exercise the strictest diligence in receiving a passenger, conveying him to his destination, and setting him down safely, that the means of conveyance employed and the circumstances of the case will permit * * *
>
> "It is sufficient for the passenger, suing on a contract for safe carriage, to establish the contract and show that he has not been safely set down at his destination, to throw the burden of explaining on the carrier. *It is for the carrier and not for the passenger to prove what negligence and who prevented the fulfillment of the contractual obligation of the carrier.*" (31 So. 772, 773.)

This rule was applied in New York in the case of *Barnes* vs. *New York Central and Hudson River Railroad Company,* 87 N. Y. Sup. 608. In that case a passenger sustained personal injuries by slipping at night on an asphalt pavement having on it oil or grease, while alighting from a train, in the train-shed of the company. This evidence was held sufficient to raise an inference that the railroad company had not exercised that care which the law requires, and to justify a verdict on the doctrine of *res ipsa loquitor.* The Court said:

> "There must be reasonable evidence of negligence, but when the thing causing the injury is shown to be under the control of a defendant, and the accident is such as, in the ordinary course of business, does not happen if reasonable care is used, it does, in the absence of explanation by the defendant, afford sufficient evidence that the accident arose from want of care on its part."

In construing the "Harter Act" it has been held in a number of cases that the owner is bound to exercise the utmost care in the selection of a master and crew and in providing a vessel in all respects seaworthy in order to avail himself of the provisions of the act, that the burden of proving that a vessel was seaworthy at the beginning of the voyage, or that due diligence had been used to make her so, rested upon the ship owner, and that such affirmative proof could not be supplied by inferences or presumptions.

Brinson vs. *Norfolk & Southern R. Co.,* 86 S. E. 371, 169 N. C. 425;
W. J. McCahan Sugar Refining Co. vs. *The Wildcroft,* 201 U. S. 378, 50 L. Ed. 794;
Ceballos vs. *The Warren Adams,* 74 Fed. 413, 20 C. C. A. 486;
The Oneida, 128 Fed. 687, 63 C. C. A. 239;

And see also:

Bradley vs. *Lehigh Valley R. Co.,* 153 Fed. 350, 82 C. C. A. 428.

Where, as in the case at bar, the injury complained of is admitted by the answer, the burden of proof is cast upon the defense to show affirmatively the matters of justification or defense set up.

Treadwell vs. *Joseph,* Fed. Cas. 14157;
The Rhode Island, Fed. Cas. 11745.

In the present case the libellees did not sustain the burden of proof, but, on the contrary, the great weight of the evidence shows affirmatively that they were negligent so far as the equipment of the shower bath

was concerned, and that this negligence caused the accident.

(b) *The degree of care required of the carrier and the application of the rule.*

A carrier owes to the passenger the highest degree of care, diligence and skill known to careful, diligent and skillful persons engaged in the business, not only in the furnishing of competent and skillful employees, but also by providing safe agencies or means employed by the carrier in the transportation of passengers, and in the facilities intended for use by the passenger on the journey.

> *Pennsylvania Company* vs. *Roy,* 102 U. S. 451, 26 L. Ed. 141;
> *International Mercantile Marine* vs. *Smith,* 145 Fed. 891, 76 C. C. A. 423.

In a case where a passenger caught his foot in an open space between a float and the boat from which he alighted, and was injured, it was held that a common carrier was bound to provide seaworthy and adequately equipped boats, as well as to use *well-known and approved appliances for the safety of the passengers.*

> *Rizzo* vs. *Winnisimet Company,* 104 N. E. 363, 217 Mass. 19.

In another case, that of *Burrows* vs. *Lownsdale,* 133 Fed. 250, 66 C. C. A. 650, the Court held that a gangplank, consisting of a plank 10 feet long, 16 inches wide, and one inch thick, with cleats nailed on one

side, but having no railing, rope or other guard, and which when extended from the deck of a steamer to a wharf, sloped downward at an angle of thirty degrees, did not furnish a reasonably safe means for discharging passengers, nor could its use be justified by custom. At page 251 of the decision, the Court said:

> "We also agree with the court below that the plank used by the officers of the steamer in question was not a safe method for the discharge of its passengers. *It is not a sufficient answer to say, as do the appellants, that it is the same kind of a plank that is usually used by similar boats plying those waters, and that it has generally, if not always, been found sufficient.* Such a plank as that described, extending over the water at such an angle, without any railing, ropes, or guards, is not a reasonably safe means of passage for man, woman or child of whatever age. The law makes it the duty of the carrier to provide a reasonably safe means for discharging its passengers, and the failure of appellants in that regard in the instance in question rendered them clearly liable in damages."

The same rule was applied in the case of *The City of Portsmouth,* 125 Fed. 264, in which a passenger was injured who, in the exercise of due care stepped or was thrown by the lurching of a vessel into a space caused by the vessel swinging away from the dock.

In *Lobdell* vs. *Bullit,* 13 La. 348, it was said that steamboats carrying passengers for hire are required to be provided with whatever is requisite for their safety, and that the owners of the vessel were liable where a steamboat was destitute of a yawl and ropes to throw to a person falling overboard.

In *The North Star,* 169 Fed. 711, where a child fell over a mat at an entrance to a saloon on a passenger steamer while in charge of her mother and her nurse, and where the evidence was conflicting as to the lighting of the cabin and passage ways, it was held that the libellant was entitled to recover.

In *Hrebrik* vs. *Carr,* 29 Fed. 298, where a passenger fell from a gangplank and was drowned, and the evidence indicated that the gangway was a single narrow plank without battens or ropes, it was held that the owners were liable in not maintaining a safer gangplank.

The case of *American Steamship Company* vs. *Landreth,* 108 Pa. 264, was one where the plaintiff fell on the slippery deck of a vessel. At the place where she fell the side of the saloon was finished from floor to ceiling by a space of smooth paneling about 12 feet in length, along which there was no guard or railing to use for support. In that case it was held that, as there was neither rail nor other object affording adequate protection against injury in case of unexpected lurch, a question of negligence was presented.

A steamship company was held liable in the case of *Mohns* vs. *Netherlands-American Steam Navigation Company,* 182 Fed. 323 (C. C. A.), to a passenger who sustained injury by a mat slipping as she entered the doorway, where the mat was too small to properly fit into its place. The trial judge in his opinion said:

> "The preponderance of the testimony clearly shows that the mat did not fit properly into its place, but was too small, both in length and width. This was noticed by several passengers,

> *but apparently not by any of the steamer's people,* who had made it to fit the place and evidently thought it did so. That is not enough, however, to relieve the steamer from responsibility for the lack of proper appurtenances for the safety of the passengers and it was liable for the results of the accident." (P. 323.)

The decree of the lower Court in this case was affirmed by the Circuit Court of Appeals.

In the case of *Gillum* vs. *New York & T. S. S. Co.,* 76 S. W. 232 (Tex. Civ. App.), where a passenger sustained injuries owing to her having fallen on the slippery deck of the steamer when stepping from the door of the saloon, and where the defense was contributory negligence, the Court said that the fact that she had taken a long step did not show her guilty of negligence as a matter of law, and that the burden of showing contributory negligence was on the defendant.

For a ship owner to leave a loose mat sliding about a passageway used by passengers, when a violent storm is raging, is negligence.

> *Compagnie Générale Transatlantique* vs. *Bump,* 234 Fed. 52, 148 C. C. A. 68.

On page 54 of the opinion, the Circuit Court of Appeals in the last named case said:

> "The plaintiff was in the custody of the master of the ship on whose judgment she had a right to rely * * * *Again, the plaintiff was warranted in assuming, if the way led through dangerous passages, that rails or ropes would be provided and that the rugs and mats on the floor would be securely fastened."

A case closely in point is that of *North German Lloyd Steamship Company* vs. *Roehl,* 144 S. W. 322, in which a passenger was injured in a toilet-room by a lurch of the vessel. The steamship company was held to be negligent in not providing hand or guard rails in the room, and a plea of assumption of risk was held insufficient for the reason that the use of the room had been impliedly invited. The room was about three feet two inches wide and about eight feet long, and its sides were smooth, as was its tiling floor. It was lighted at night by electricity. There was no hand hold, hand or guard rail near the door, nor along either side of the room, although sister ships had been so provided. There was, however, a vertical hand rail near the seat, but this could not be reached by a person just entering the room. Just as the plaintiff entered the room the ship gave a violent lurch, causing her to loose her balance, and there being nothing for her to grasp to keep herself from falling, she was violently thrown the length of the room and was injured. (Pp. 323, 324.)

The appellate Court found, on these facts, that the failure to provide hand or guard rails near the door or along the side of the room was negligence, and held also that the fact that other steamship companies engaged in similar business had not equipped rooms of the kind in question with guard rails, if such was the fact, did not justify the steamship company in failing to provide such rails, if a very *cautious and prudent person, in the exercise of that high degree of care that is required by law of a carrier of passengers, would*

have provided them. The Appellate Court also ignored and disposed of the claim of the steamship company, based on the opinion of a witness, that the plaintiff might have steadied herself by putting her hands on the opposite walls. (P. 325.)

The facts in the case just cited were closely similar to those in the case at bar, with the additional fact appearing in the present case, that ships of another line, the Oceanic Steamship Company, running between San Francisco and Australia, via Honolulu, were equipped, and had been for many years with several devices in the shower baths to insure the safety of passengers which were lacking in the shower baths on the "Great Northern."

The cases cited above show how the Courts have applied the rule relating to the care required of carriers in the transportation of passengers for hire, and they clearly show that this Court would be fully warranted in holding the appellees in this case liable for the injuries sustained by Mr. Hutchins while using the shower bath on the "Great Northern." It was part of the undertaking and contract of the owner of the vessel that she was suitable in every particular for the undertaking, and evidence which merely leaves the question in doubt will not relieve the carrier. (*The Emma Johnson,* Fed. Cas. 4465.)

A careful reading and analysis of the evidence in the case, and an inspection of the photographs introduced, can but lead to the conclusion that the Great Northern Pacific Steamship Company was negligent in failing to equip the shower baths with devices that

would have prevented the accident. Such devices should have been furnished, of course, not only to safeguard the passengers during favorable weather conditions, but also during such times as unfavorable weather might cause a lurching or rolling of the ship. The opinions of the witnesses on the subject, especially where no particular qualification was shown, are entitled to but little weight. The facts speak for themselves, and this Court can draw the conclusions.

II.

The employment of an incompetent physician and surgeon for service on the vessel rendered the libellees liable for the additional pain and suffering caused the appellant as a result of the incompetency.

1. THE NATURE OF THE INJURY AND ITS TREATMENT BY OTHER PHYSICIANS THAN THE SHIP'S SURGEON INDICATED THAT THERE WAS BUT ONE PROPER METHOD OF TREATMENT.

A number of the witnesses testified as to the nature of the injury sustained by the libellant and the treatment rendered him by physicians other than the surgeon of the ship.

The libellant himself said, on direct-examination, that he felt a crunching in his shoulder, so much so that it seemed to him he had dislocated it. (Tr., p. 75.) Shortly after the accident the pain became excruciating. (Tr., p. 85.) He suffered pain from the time of the accident until the vessel arrived in port on the morning of February 21st, 1916, and immediately upon his arrival in Honolulu, libellant consulted Dr. C. B. Wood, who made an examination

of him. (Tr., pp. 85-89.) Dr. Wood directed him to go to Dr. Straub, and have an X-ray photograph taken, which was done. (Tr., p. 91.) At Dr. Straub's suggestion Mr. Hutchins then returned to Dr. Wood's office, and Dr. Wood bound up the arm. About 28 yards of bandage was used, and this was put on every second day for about four weeks. (Tr., pp. 91-92.)

Dr. C. B. Wood, a qualified physician and surgeon, on behalf of the libellant, testified on direct-examination, that on February 21st, 1916, Mr. Hutchins visited him professionally, and that he then made an examination. He found a disability of Mr. Hutchin's left arm at the shoulder joint. Hutchins was unable to move the arm very much himself, and would not allow anybody else to move it because it was painful. The Doctor suspected, from Mr. Hutchins' condition, a fracture, and advised the taking of an X-ray photograph. This protograph showed a fracture in the left shoulder joint. The Doctor did not make any positive diagnosis until he saw the X-ray plate, but the symptoms were symptoms of fracture, not plainly visible, but *plainly demonstrable.* The fracture did not show any great amount of deformity. It belonged to the class called impacted fractures. There was no great displacement of the bones, or any particular deformity over the shoulder. In moving the arm, which the Doctor did as well as he was able, he did not note the slipping and grating sounds which are wanted when there is a displaced fracture. These signs are all absent in what is called an impacted fracture,

which is what the injury proved to be. The whole shoulder was discolored, and away down on the chest and over the back there was a dark coloring under the skin. It was there a long time. Any fracture around a large joint is a serious fracture. Dr. Wood treated Mr. Hutchins until the latter part of March. *As soon as Dr. Wood ascertained that there was a fracture he immobilized the arm* by means of bandages, and kept it in position for several weeks. Mr. Hutchins was apparently suffering a great deal of pain at the time, and the pain continued, when the shoulder was moved, as long as the Doctor treated him. From his examination in the first instance the Doctor was satisfied that the injury was something more than a bruise, and *suspected a fracture as soon as he manipulated the shoulder.* The first examination took him ten or fifteen minutes, and he was very well satisfied that there was a fracture. Mr. Hutchins' last visit to the Doctor was about March 28th, 1916, and at that time he was not using the arm for ordinary purposes. As to the effect of the fracture upon the arm and shoulder, as to length, etc., there must have been some shortening there in the bone, because the shaft of the bone, as shown by the X-ray picture, was pushed into the head of the bone, not to a great extent but to some extent. In an examination made of Mr. Hutchins a few days before February 17th, 1917, the Doctor found that the arm would not go as far behind as it ought to because of the pain, and by raising it over the head, the same thing resulted, although you could get it pretty well up. At Dr.

Wood's suggestion, another X-ray plate was made by Dr. Hobdy. In the bandaging of the shoulder Dr. Wood stripped Mr. Hutchins to the waist, brought the arm up into position, and fastened it there with bandages and adhesive straps. As Mr. Hutchins was a heavy man, and perspired very freely, in two days the Doctor removed all the bandages, washed his skin thoroughly with soap and water, and then with alcohol, powdered him, and then replaced the bandages. That was done every two days for a considerable length of time. (Tr., pp. 131-136.)

On cross-examination Dr. Wood described in detail the manipulation of the arm, and said that immobilizing the arm consisted in tying it up in the most comfortable position and preventing it being moved, the main object of immobilizing being to prevent movement. It can be done with bandages or plaster of paris casts. He considered both methods and thought it sufficient to put the arm up snugly in bandages and keep his eye on the bandages, rather than fasten Mr. Hutchins up in a big, stiff, plaster of paris cast. The shoulder was not out of position and did not require what would be called setting. (Tr., pp. 136-144.)

On redirect-examination Dr. Wood said that judging by what he knew of the injury and from his observation of the X-ray plates, taken in connection with a recent examination after the lapse of nearly a year, his opinion was that there might be some slight permanent result in the limitation of all the motions of the

joint, and perhaps twinges of pain in making extreme motions of the joint for some considerable time longer. He thought that was evident enough. (Tr., pp. 148-149.)

On recross-examination Dr. Wood said that from his examination of the injury it appeared that the whole length of bone must have been driven towards the shoulder, otherwise the impacted fracture would not have occurred. (Tr., pp. 150-151.) On redirect-examination he said that an impacted fracture was caused by the bone being shoved up into the joint, the hard portion of the bone being shoved into the soft portion. Before the doctor saw the X-ray plate, the symptoms indicated an impacted fracture. The symptoms were a serious injury to the joint, which meant a probable fracture, and in the absence of deformity, and a crepitus, his opinion then was that it was an impacted fracture. Having formed the judgment that it was fractured, and then failing to get a crepitus or displacement or bone deformity, he judged it was impacted because those things were absent. (Tr., p. 154.)

Dr. W. C. Hobdy, a doctor of medicine, holding a diploma and license to practice medicine and surgery in the Territory of Hawaii, and a practitioner there of seven years' standing, called for the libellant, on direct-examination, said in the month of March or April, 1916, Mr. Hutchins was referred to him by Dr. Wood primarily for the purpose of having an X-ray examination made of the injured shoulder. The shoulder was very painful at the time and Dr. Hobdy

did not make an extended examination of the shoulder itself, or attempt to have him move it at all. From the superficial examination he made he thought there was in all probability a fracture or a severe injury of the shoulder, or the head of the arm bone, the humerus. Upon making the X-ray picture he found a fracture of the neck of the humerus, which had not only been broken, but had been driven into the head of the bone. It was what was called an impacted fracture. It was a serious fracture. (Tr., pp. 177-178.)

Dr. G. F. Straub, a qualified physician and surgeon, practicing in the Territory of Hawaii, on behalf of the libellant, testified on direct-examination, that in February, 1916, he took an X-ray picture of Mr. Hutchins' arm and found an impacted fracture of the right upper end of the humerus. He also made some examination of the injury. He moved the arm and felt some symptoms that pointed to a fracture. He also found an inability on the part of the patient to move the arm, he could not elevate it, due to the severe injury to the upper part. The doctor said he knew Mr. Hutchins was suffering pain at the time. (Tr., pp. 189-190.)

Dr. Barney R. Simons, a witness for the libellees, testified on direct-examination that after Mr. Hutchins fell in the shower bath he helped get him out immediately, and that he was unconscious. The ship's surgeon was sent for at once, and Mr. Hutchins was assisted to a stool. He complained of severe pain in the heart and shoulder, gasping the words very in-

audibly, placed his right hand to his heart, and then lapsed into an unconscious condition again. The ship's surgeon, assisted by Dr. Simon and the steward, then carried Mr. Hutchins out of the bathroom lobby. (Tr., pp. 575-576.)

All of this evidence goes to show that the injury sustained by Mr. Hutchins was a very serious one, requiring prompt and efficient medical treatment, such treatment as was in fact given by Dr. Wood upon the arrival of Mr. Hutchins in Honolulu. The surgeon of the ship, however, by his treatment of the injury, showed that he was grossly incompetent.

2. THE ACTIONS OF THE SURGEON OF THE VESSEL AND HIS TREATMENT OF THE INJURED MAN SHOW GROSS INCOMPETENCE.

A number of witnesses testified in the case as to the manner in which the surgeon of the ship treated the injury.

The libellant, on direct-examination, said that after the injury the ship's doctor was sent for and he, Hutchins, was taken to his stateroom, the doctor and the steward going with him. The doctor then made an examination of the arm and of the bruises to see if there was any injury. The doctor's name was R. J. McAdory. Mr. Hutchins told him he thought his shoulder was broken. The doctor took hold of his arm, moved it around, felt of his shoulder, and said, no, it was a bad sprain. The doctor said he could feel the broken points of the cartilage, and explained that around the edge of the shoulder socket there was a cartilage that had undoubtedly broken away, that it

was simply a sprain, and that he could feel the prickly points of this cartilage. Mr. Hutchins was then laid in his berth, and the doctor examined his limbs, but did not find anything further. The doctor gave Mr. Hutchins a couple of pellets, asked him if he wanted some brandy, to which Mr. Hutchins replied that he did not drink anything, and then left him, without doing anything else. The whole thing did not last over five or ten minutes. The accident happened about half-past six in the morning, and the doctor did not call at Mr. Hutchins' stateroom again during that day. The next morning he came while Mr. Hutchins was getting dressed, but the doctor did not then put bandages on the arm, or take any other steps to render surgical aid. He did nothing further. The doctor told him that it was simply a bad sprain, and said it would be all right in a few days. The morning after the accident, when the doctor visited Mr. Hutchins, he moved the arm around a little, said there was no fracture, but that it was a bad sprain, and went out. The doctor did not do anything more at any time after that during the voyage. The accident happened on the morning of the 18th, the vessel arrived at Hilo early Sunday morning, the 20th, and reached Honolulu at about 10:00 o'clock on the morning of the 21st. (Tr., pp. 83-86.) Neither the ship's doctor nor the captain suggested to Mr. Hutchins that he go and see another surgeon, at any time. (Tr., p. 93.)

On cross-examination Mr. Hutchins testified that he did not think the doctor occupied more than about five minutes in making the first examination. Mr.

Hutchins kept complaining and told him it was his shoulder, and told his wife that his right shoulder was injured, and said to the doctor: "I think, doctor, I have broken my shoulder." The doctor moved the arm around a good deal, but did not give any advice or instruction, and said it was just a bruise or a sprain, a bad sprain, and that it would be all right in a few days. The doctor went out and returned in a few moments with the pellets, which he gave Mr. Hutchins. The next morning the doctor manipulated the arm to some extent. It was very painful and there was a great deal of rigidity so that it could hardly be moved at all. It was so rigid that morning that Mr. Hutchins could hardly get his undergarments on. (Tr., pp. 160-163.)

On redirect-examination Mr. Hutchins said that after the doctor made the second visit to his stateroom, he saw him every few hours around the ship, probably a dozen times in all, and that each time the doctor saw him Mr. Hutchins had his arm supported by putting his hand through in the vest, with the other hand supporting it, and the doctor saw him in that condition. The second examination in the stateroom the morning after the accident lasted only about eight or ten minutes. There was no one with him at that time. (Tr., pp. 168-169.) Mr. Hutchins told the doctor how he had fallen, that he had fallen out of the bath, and injured his shoulder, and that he felt very badly injured and, in fact, was very sure it was broken. Mr. Hutchins felt a crunch of the bones and told the doctor

that, saying, "Doctor, I am sure I have got a broken arm." (Tr., p. 175.)

Captain Ahman, of the "Great Northern," testified on cross-examination, that he saw Mr. Hutchins on the evening of the 18th of February. The doctor had not then reported the accident to the captain. The report was made the next morning, and was to the effect that Mr. Hutchins had fallen and *hurt his shoulder slightly.* (Tr., pp. 482-483.)

Dr. Robert J. McAdory, the surgeon of the vessel, testifying for the libellee, on direct examination said that his first connection with the injury sustained by Mr. Hutchins was when he was called to the bathroom where the injury occurred. When he arrived he found Mr. Hutchins sitting on a stool gasping and breathing heavily, and apparently suffering a good deal of pain. The doctor made no examination of him there, but learned from some bystander that Mr. Hutchins had slipped in the bathroom and had fallen on his shoulder. Mr. Hutchins was taken to his room, and after he had been put in bed the doctor first administered a grain of codeine, which, in some measure, alleviated his pain. This was administered in little tablets of half a grain each. The doctor then left to attend another call, and returned after an interval of probably ten minutes. At this time the doctor made *a slight examination of the shoulder.* He rotated the arm, having in mind the possibility of a fracture there, but, owing to the voyage being near the close, and as Mr. Hutchins was suffering a good deal, he did not care to subject him to the necessary manipulation and ascertain

the absolute condition of the joint, as whoever subsequently would take charge of the case would have to go through the same formality and subject the patient to additional manipulation and unnecessary suffering. The doctor said, in his opinion, if the fracture was an impacted one, where the bones would act as a splint for themselves, there would not be any injury in allowing the arm to go without immobilizing it for two days, while, on the other hand, if the ends were asunder, it would not be wise to let the broken bone go without immobilizing it because the jagged ends would be tearing into the soft parts at every movement. It was not entirely clear in the doctor's own mind what the matter was, and for that reason he recommended the making of an X-ray photograph as soon as Mr. Hutchins arrived in Honolulu. The doctor said he did not remain with Mr. Hutchins longer than about five minutes after he returned from the other call. He noticed Mr. Hutchins the same evening with his arm held up in a sling by a large silk handkerchief. The doctor said he did not follow up the case very closely subsequently but saw Mr. Hutchins at meals or on deck occasionally. At the time of the accident there was no deformity displayed, no objective symptom in that direction, but the doctor thought there was a slight abrasion on the elbow. He saw Mr. Hutchins subsequently in Dr. Wood's office, when he was very much bruised over the chest on that side, and over the arm. (Tr., pp. 368-380.)

On cross-examination Dr. McAdory said that after he had looked at Mr. Hutchins' arm in the stateroom he did not think he told him he had sustained a bruise.

He did not think he used the term "bruise", but thought he used the term "contusion", but he would not swear positively as to that. If he had immobilized the arm at the time the accident happened, it would not have done any harm even if it had been a bruise. (Tr., pp. 383-384.) It would have taken probably about half an hour to have immobilized the arm. The grain of codeine was administered to Mr. Hutchins shortly after they got him in bed. Codeine is an analgesic, it does not numb the senses but eases the pain. He did not know whether there were any other doctors on board the "Great Northern" on that voyage and made no inquiry to find out. (Tr., pp. 385-386.) Outside of administering the grain of codeine the doctor did not give Mr. Hutchins any more medicine on that voyage, did not make any sling or cause any sling to be made for his arm, and did not undertake to immobilize the arm. He heard a grating of the sesamoid bones around the front of the glenoid, but he could not definitely state it was that particular bone. It did not give the same grating sound that a crepitus would. Mr. Hutchins was a heavy man, and had told the doctor that he fell out of the bathroom on his left shoulder, and the doctor saw him sitting on the stool gasping and suffering pain. The doctor did not think it was the proper thing in view of what took place and in view of his examination, to immobilize the arm under the conditions. (Tr., pp. 393-395.)

Dr. McAdory was the only witness in the case who was of the opinion that the arm should not have been immobilized immediately after the happening of the accident. As this was merely his own unsupported

opinion as to his own competency, this testimony, of course, has no weight.

On further cross-examination the doctor said that he would have had no trouble in administering an anaesthetic or of getting the assistance of any doctor on board in case of necessity. The immobilizing of the arm, even if it was only a bruise, would not have subjected the patient to any injury, and could have been done with perfect safety, with the exception of a possibility of excoriations of the skin, which would have caused some physical discomfort. At the time he made the examination he had a suspicion in his mind that there was a fracture of the shoulder or arm, and the reason he did not immobilize it then was because the symptoms that he could elicit were not sufficient to clear the matter up in his mind. (Tr., pp. 401-404.)

On rebuttal, Mr. Hutchins said that nothing was said by Dr. McAdory about putting the arm in a sling. He said it was a bad sprain and would be all right in a few days. Mr. Hutchins did not put any sling on, but unbuttoned his vest, placed his arm in position, and held it up until the arrival in Honolulu. Dr. McAdory did not say anything about having an X-ray picture taken either. (Tr., p. 423.)

The libellees' witness, Barney R. Simons, said that when Dr. McAdory came to the bathroom where the accident happened, he did not ask for any general description or history of the case. About two hours after the accident Mr. Simons passed the doctor on the deck and asked how the patient was. The doctor said that he was getting along very nicely; that he was badly

bruised, and that he had given him a hypodermic, and he came around all right. Nothing was said by the doctor as to whether there was a broken bone in the arm, but his conclusion was that the arm was just a bit bruised. (Tr., pp. 584-585.)

3. THE EVIDENCE IN THE CASE OVERWHELMINGLY ESTABLISHES THAT THE SURGEON OF THE VESSEL WAS GROSSLY INCOMPETENT.

Aside from the evidence in the case showing the nature of the injury, and the proper method of treatment, as shown by the testimony of skilled physicians and surgeons other than the ship's doctor, there is considerable testimony of an affirmative nature that proves that Dr. McAdory was not only negligent, but was grossly incompetent.

Dr. C. B. Wood, the libellant's witness, testified on cross-examination, that provided a physician was given an opportunity to see the shoulder he should have discovered after the first examination, that there was something more than a bruise or an external injury, and discovering that, should have made the best possible effort to find how extensive the injury was, and *should have immobilized the arm.* (Tr., p. 144.)

On redirect examination Dr. Wood said that assuming that the doctor visited Mr. Hutchins within a few minutes after the accident, then made an examination and did nothing more than to give him two pellets, and next morning came back and made another examination, in his opinion, he would be able to discover that there was something more than a

bruise the second day. (Tr., pp. 147-148.) Dr. Wood also said that *a competent physician knowing or hearing from a patient how such an injury had occurred, observing the symptoms, and knowing the history of the case, in his opinion should have suspected that there was probably an impacted fracture at the time he first examined him after the injury* was sustained, and suspecting it, should have taken all the means he considered necessary and best to prevent motion of the joint. From the symptoms he should have strongly suspected an injury to the joint, and an impacted fracture there, the treatment of which would be a fixing of the arm so that it could not move or what is known as immobilization. There was nothing in such treatment that would have been improper if the injury had been a bruise or sprain only. *A competent physician who had seen the symptoms soon after the injury occurred, and who knew how the injury was sustained, should have immobilized the shoulder joint, and stronger reasons would exist for a physician doing that on the second examination 24 hours later.* (Tr., pp. 154-157.)

Dr. W. C. Hobdy, another of the libellant's witnesses, said on direct examination that the proper treatment for Mr. Hutchins' injury under the circumstances, and eliminating any facts that were disclosed by the X-ray examination, would be absolute immobilization, that is, keeping the arm absolutely still. (Tr., pp. 179-181.)

On cross-examination Dr. Hobdy said that the symptoms that would be manifested at once, or in the course of thirty minutes after the injury, would be,

first of all, pain, and, second, and most important, the loss of limitation or function, that is, inability to move the arm about. *He thought any competent surgeon should have been able from the symptoms that necessarily manifesed themselves within thirty minutes after the injury, to have diagnosed what was the matter,* and that from the history of the case learned from the patient and from the symptoms that manifested themselves, a competent surgeon should have known that there was probably a fracture. In answer to questions by the court, Dr. Hobdy said that *any good surgeon in Honolulu would have immediately made a diagnosis tentative of fracture.* The idea of fracture would have entered into any competent surgeon's mind at once. If a surgeon treats a bruise as a fracture, there is no great harm done to the patient, but if he treats a fracture as a bruise, there might be harm done. It was necessary, of course, for a surgeon to have a history of the case. (Tr., pp. 181-187.)

Dr. G. F. Straub, on behalf of the libellant, testifying on direct examination, said that if he had had to treat Mr. Hutchins' case he would have immobilized the arm, either would have put the arm in a simple sling and fastened it with bandages, or would have put a triangle of wood, which is a much favored treatment in such cases. Before Dr. Straub took the X-ray picture he felt a slight crepitation which made him suspect a fracture, and, having that suspicion, he would have immobilized the arm. *If a physician had been called in directly after the accident occurred, and a history or a statement of how the accident occurred*

had been communicated to him, and if he made an examination, he should have immobilized the arm, and if the injury had been simply a bruise the same thing should have been done, because if it was a simple bruise, the immobilization would do no harm. *Upon being asked whether it was skillful treatment to allow the arm to remain as it was without bandaging it, or without immobilizing it, from the 18th of February until the 21st, the witness said he did not see where the treatment came in, there was no treatment at all. Skillful treatment, under the circumstances, would mean immobilization.* (Tr., pp. 190-198.)

After this evidence of incompetency had been presented to the lower court, and during the hearing, the court said (Tr., p. 202):

> *"As far as the proof goes up to date the doctors have testified . . . that from the symptoms that would naturally exhibit themselves immediately after this injury, a competent physician should have known that there was a probable fracture and should have treated it as a fracture."*

The court also said that the testimony of these doctors of course would tend very strongly to prove, to put it mildly, that the physician, Dr. McAdory, was not competent, otherwise he would have treated the case in the way in which they said a competent physician would have treated it. (Tr., p. 202.)

John S. Ford, the purser of the "Great Northern," on behalf of the libellant, said on direct examination that Dr. McAdory's name was on the ship's articles as the ship's surgeon, and that he drew a salary of $75 per month. (Tr., pp. 230-231.)

On cross-examination Mr. Ford said that in addition to the salary the doctor was allowed to charge any passenger that came aboard, and that his meals were included with his salary. (Tr., pp. 234-235.) On redirect examination he said that the doctor was paid by the ship to look after the passengers under the direction of the captain, and any money he got outside of this salary was voluntary. (Tr., pp. 235-236.) The only authority the purser knew of for charging passengers was that the doctor was allowed to by the company. (Tr., pp. 237-238.)

Dr. McAdory himself testifying for the libellees, on direct examination said that he was 45 years of age, had been a physician since 1897, and was licensed to practice medicine and surgery in California, Arizona, District of Columbia and Territory of Hawaii. During the past three years he had been surgeon with the Toyo Kisen Kaisha, the American-Hawaii Steamship Company, United Fruit Company and the Great Northern Pacific Steamship Company. He had also served on the hospital ship "Relief," on the transport "Valencia," on the transport "Grant" and on the transport "Logan." (Tr., pp. 360-362.)

Dr. C. B. Wood, on behalf of the libellant, was called in rebuttal, and said on direct examination that it was not necessary to administer an anaesthetic in Mr. Hutchins' case before immobilizing the arm and that immobilization was the propert treatment. (Tr., pp. 415-419.) On cross-examination he said that in Mr. Hutchins' case the surgeon should have ascertained not perhaps exactly what the injury was, but

that there was a painful and somewhat serious injury to the patient's shoulder joint, and that *the recognized treatment in cases of that kind as to immobilizing the joint should have been carried out anyway.* (Tr., pp. 419-423.)

The court below in its findings and opinion said:

> "The evidence does not show that the surgeon did anything he should not have done, or that anything he did caused any injury or suffering. He simply administered codeine to alleviate libellant's suffering. He did not treat the injury at all, because, he says, he was not sure there was a fracture, and because, he says, the vessel would arrive in Honolulu in sufficient time to admit of deferring treatment until such arrival. *That he should have at once properly treated the injury so as to permit a recovery to begin at once is doubtless true. But he did not.* Is the vessel liable for such damages as resulted from his failure to do so?" (Tr., p. 668.)

Notwithstanding the fact that the evidence of all of the disinterested doctors who testified in the case clearly established the incompetency of Dr. McAdory, and notwithstanding the fact that the court during the hearing, and after it had heard the medical testimony, said that a competent physician should have known that there was a probable fracture and have treated the injury as a fracture, and that the testimony of the doctors tended very strongly to prove "to put it mildly" that Dr. McAdory was not competent, as he did not treat the injury as a competent physician would (Tr., pp. 201, 202), the court in its opinion and findings said:

> "Whether the vessel is liable for injuries caused by incompetency of the physician employed even though due caution was exercised in his selection and employment, or is liable for damages caused by his incompetency only when it has failed to exercise due care in his selection and employment, it is unnecessary to decide in this case, because *there is no evidence to justify a finding that the surgeon was incompetent.*" (Tr., pp. 675-676.)

This finding of the Court cannot be reconciled with the evidence in the case in any particular. All of the evidence bearing on the point shows that the surgeon of the ship was grossly incompetent. There is not only no evidence in the case to warrant the assumption that the surgeon was competent, but the evidence establishes affirmatively and clearly that he was not. The contrary assumption of the Court is in conflict with the evidence and is evidently based upon a misconception of it.

As we have already shown in another part of this brief, this Court may disregard the findings of the trial judge, and may form its own conclusions based upon the record.

4. THE INCOMPETENCY OF THE SURGEON OF THE VESSEL CAUSED THE APPELLANT PAIN AND SUFFERING THAT WOULD NOT OTHERWISE HAVE RESULTED.

The Court below found that the evidence did not show that the surgeon did anything he should not have done, or that anything he did caused any injury or suffering. (Tr., p. 668.) The Court also found that there was no evidence of any damages caused by in-

competency. (Tr., p. 676.) Neither of these findings are supported by the evidence but are directly contrary to it.

Dr. C. B. Wood was asked the question on redirect-examination, when called as a witness for the libellant, as to what effect, in his opinion, the fact that there was no bandaging of the arm, and no adoption of any other method, from the time the injury resulted on February 18th, until the vessel arrived in Honolulu on the 21st, would have, and he answered, unequivocally, that *it would have the effect of unnecessarily submitting the patient to pain.* (Tr., p. 149.)

This is another instance where the Court below either misconceived the effect of material and uncontradicted evidence in the case, or absolutely ignored it.

5. THE APPELLEES DID NOT EXERCISE DUE CARE IN THE SELECTION OF A SURGEON FOR SERVICE ON THE VESSEL.

It was contended by counsel for libellees in the Court below that under the law there could be no liability on account of the surgeon's negligence or incompetency unless the libellees failed to exercise due care in the selection of the surgeon. While we do not believe this is a proper construction of the law but that an absolute duty rested upon the libellees to provide for the ship a competent surgeon, we yet contend that even if the law is as claimed by libellees the testimony in the case shows that there was no due or reasonable care exercised by them in the selection of

the surgeon Dr. McAdory for service on the "Great Northern."

Captain Ahman, on behalf of the libellees, stated on direct-examination, that Dr. McAdory was first engaged as surgeon of the ship about November 15th, 1915. He asked the doctor if he had any experience at sea, and was told that he had been in the Pacific Mail. The doctor also said that he had been in the United States Army but the captain did not know where he had served. The captain did not look into the matter of what certificate the doctor had, if any, because the hiring was by the marine superintendent, Mr. Wiley. At the time no fact or circumstances came to the knowledge of the captain to raise the question of competency or incompetency. The captain's belief was that he was a doctor. During the doctor's service, the captain had no knowledge of any complaint having been made by the passengers regarding the competency. (Tr., pp. 278-281.)

On cross-examination the captain said that the inquiries relative to competency were with the doctor himself. He did not ask any other doctor about the matter, was not told what college the doctor came from, and did not write to any of the colleges or hospitals where the doctor had been or served. (Tr., p. 281.)

Mr. John B. Morris, the engineer of the vessel, on behalf of the libellees, testified on direct-examination, that Dr. McAdory was engaged as ship's doctor on November 6th, 1915. It was the duty of the marine superintendent to engage surgeons for the ship. Mr.

Morris was sitting in his room talking business with Mr. Wiley, on the ship, when Dr. McAdory knocked at the door, came in and asked for Mr. Wiley. Mr. Morris said: "Here is Mr. Wiley, right here." The doctor then introduced himself. They had evidently had some correspondence, and Mr. Wiley inquired: "Doctor have you a certificate for practicing in the State of California?" The doctor replied: "Yes." Mr. Wiley said: "You have been on different ships?" To which the doctor replied. "Yes." Mr. Wiley then inquired what places he had been, and the doctor mentioned two ships of the Toyo Kisen Kaisha, the "Tenyo" and the "Chiyo Maru" the witness thought, but was not positive. He was not sure that he mentioned any other steamship line, but he did say that he had been an army surgeon at Camp McKinley in Honolulu. (Tr., pp. 310-312.)

Dr. McAdory, himself, also testified for the libellees as to the manner of his employment. On direct-examination, he said, that he made application to the marine superintendent, Mr. C. W. Wiley, for the position of physician and surgeon on the "Great Northern" when he learned she was going on the Honolulu run. He saw Mr. C. W. Cook, the marine superintendent of the American-Hawaiian Company in San Francisco, and showed Mr. Wiley letters from the American-Hawaiian Company, the Toyo Kisen Kaisha, and the Medical Society of the State of California. The doctor was then appointed, Mr. Wiley saying, that he would try him out for one trip. The doctor first saw Mr. Wiley on board the steamship

"Great Northern" in the room of Mr. Morris, the Chief Engineer, who was present at the time. The letters and certificate referred to were shown to Mr. Wiley at the Palace Hotel. When the doctor first saw Mr. Wiley he was in close consultation with Mr. Morris upon some ship matters, and was very busy. He said he had not taken the matter up before, that there were several applicants, and that he would consider it later. *The interview with Mr. Wiley then lasted scarcely a minute.* The doctor waited several days and then called on Mr. Wiley again. About the only place he could be seen was down on the dock, at the ship. The doctor saw him again in Mr. Morris' room and asked him if he had done anything about it. Mr. Wiley said he would take the matter up that afternoon if the doctor would come to see him at the hotel and discuss it. About five o'clock in the afternoon the doctor met Mr. Wiley at the Palace Hotel and showed him the letters. Wiley said: "Well, I will try you out for one voyage, consider the matter closed." *That conversation lasted only as long as it took Mr. Wiley to say what the doctor testified and to read the letters.* The papers were shown to Mr. Wiley at the interview at the Palace Hotel. The letters and certificate were introduced in evidence and marked "Libellees Exhibits 2, 3, and 4" (Tr., pp. 62-65.) The first was a statement on a letterhead of the Toyo Kisen Kaisha, dated November 11th, 1914, signed W. H. Avery, to the effect that Dr. McAdory was engaged by that company as ship's surgeon from September, 1913, to May, 1914, that during the time

he served in that capacity his services were found to be eminently satisfactory, and that they had no hesitancy in recommending him to anyone desiring the service of a gentleman of his capability. The next was a certificate on a letterhead of the Medical Society of the State of California, dated November 12th, 1914, signed "Philip Mills Jones, Secretary," to the effect that Dr. McAdory was a regularly graduated physician, licensed to practice in the state and for some time had been favorably known to the office. The third was on a letterhead of the steamship "Honolulan," American-Hawaiian Steamship Company, dated August 25th, 1915, to the effect that Dr. McAdory had been surgeon on the "Honolulan," plying between San Francisco and New York, via the Panama Canal, from November, 1914, to August, 1915, and that his services were entirely satisfactory and were only terminated when the company discontinued its passenger business.

Mr. C. W. Wiley testified for the libellees, by deposition, and on direct-examination said, that he had been employed by the Great Northern Pacific Steamship Company, as Marine Superintendent, from July 1st, 1915, until August 1st, 1916, and as such superintendent was in charge of the hiring and discharging of all men connected with the actual operation of the steamships "Great Northern" and "Northern Pacific". He engaged Dr. McAdory in October, 1915, as surgeon for the "Great Northern" and the doctor continued as such until the ship was taken off the Honolulu run the latter part of April or the first of May,

1916. Written application was made by the doctor to the witness for the position, stating what ships he had been on. The doctor mentioned the Toyo Kisen Kaisha Company, and presented letters from the Medical Society of California and from Captain Anderson of the steamship "Honolulan". Mr. Wiley said he was well acquainted with Mr. C. W. Cook, the Pacific Coast manager of the American-Hawaiian Steamship Company, and went personally to Mr. Cook's office and asked him about the record and services of Dr. McAdory while in their employ on the "Honolulan." Mr. Cook gave a very good recommendation stating that the doctor's services had been entirely satisfactory. Mr. Black, of the Bank of California in San Francisco, also came to Mr. Wiley and recommended Dr. McAdory, stating that he had been a passenger on a trip from San Francisco to New York and could recommend Dr. McAdory very highly as a ship's surgeon, as the doctor had attended to himself and his folks. Mr. Wiley also asked Dr. McAdory if he had a certificate permitting him to practice in California, and the doctor answered that he had. No matter or thing came to the knowledge or attention of Mr. Wiley he said in any manner reflecting upon the qualifications or competency of Dr. McAdory as a physician and surgeon, and, in his opinion, Dr. McAdory's services were entirely satisfactory. He never heard any complaint during the season Dr. McAdory served on the "Great Northern" as to the doctor's qualifications or competency. *The complaint of Mr. Hutchins,* the libel-

lant, *did not come to the knowledge of Mr. Wiley during that season, and had only just come to his knowledge at the time he testified on March 6, 1917.* (Tr., pp. 632-639.)

On cross-examination Mr. Wiley said he did not know of his own knowledge what institutions of learning Dr. McAdory attended, that he did not remember making any inquiry at the time Dr. McAdory was employed for the "Great Northern" as to what institutions of learning the doctor had attended, and the length of his attendance at the same, and that his employment by the American-Hawaiian Steamship Company and his employment by the Toyo Kisen Kaisha Steamship Company was what he based his judgment on in hiring the doctor for the position on the "Great Northern". He understood that Dr. McAdory had a license to practice medicine under the laws of the State of California. The doctor was signed on the ship's articles at $75 per month, and at the end of the season, was given a bonus, which, according to the best of Mr. Wiley's recollection would make his salary equal to about $100 per month for his services. (Tr., pp. 632-643.)

It can hardly be said that under these circumstances the libellees exercised that due and reasonable care in investigating the competency of Dr. McAdory that the law requires. On both of the occasions when Dr. McAdory interviewed Mr. Wiley on the vessel the time consumed in discussing the matter was negligible. At the interview at the Palace Hotel, where, for the first time, Mr. Wiley was put in possession

of the letters or certificates, but a few moments intervened before the doctor was engaged for the service. The letters or certificates themselves were in the form common to such general recommendations, and were probably secured as most such recommendations are, upon a bare request and without any real consideration of the efficiency or competency of the person recommended. The whole matter of employment seems to have been done in a very perfunctory manner, and in the great haste. The personal conversations Mr. Wiley had with Mr. Cook and Mr. Black do not appear to have occurred prior to the employment. They could not have occurred, as shown by the record, after Mr. Wiley had been put in possession of the letters of recommendation, because that matter occurred at the interview at the Palace Hotel, and as soon as Mr. Wiley was handed the letters and had read them he employed the doctor. There was no independent investigation by Mr. Wiley as to whether the doctor actually held a certificate to practice medicine or whether his license had been revoked, and there was no inquiry by Mr. Wiley into the personal habits of the doctor or as to his record in the army. The doctor appears to have been hastily employed upon his own word that he was a licensed physician and had the experience he claimed. The very fact that a person of Dr. McAdory's age and assumed experience was willing to devote his whole time as a physician and surgeon for $75 or $100 a month and board, in itself was sufficient to call for some personal investigation at sources where the facts could be ascertained.

As showing the perfunctory manner in which the duties of officers of a ship are frequently performed, and how little the officers and employees really know in relation to matters that are supposed to be within the scope of their duty, Mr. Wiley himself testified that the complaint of Mr. Hutchins, the libellant, did not come to his knowledge until the time he testified, on March 6th, 1917, although the injury occurred more than a year prior to that time, and yet Mr. Wiley assumed to say that Dr. McAdory's services on the "Great Northern" were entirely satisfactory and that he did not know of any complaint by anyone as to the doctor's qualifications or competency. The court below, too, notwithstanding the fact that the testimony showed no real investigation as to the matter of competency, found that there was no evidence of negligence in the selection and employment of the doctor, and that the evidence showed the exercise of due care in regard thereto. (Tr., p. 676.)

The appellees not only did not sustain the burden of proof of showing due care and diligence in the selection of the surgeon, but the evidence affirmatively shows lack of care and of diligence.

6. THE LEGAL LIABILITY OF THE APPELLEES BY REASON OF THE EMPLOYMENT OF AN INCOMPETENT PHYSICIAN.

Under the state of facts disclosed by the testimony narrated above concerning the nature of the injury, and its treatment, or lack of treatment, by the surgeon of the ship, it is contended by the appellant that the appellees are liable for the additional pain and suf-

fering caused Mr. Hutchins as a result of the doctor's incompetency. The basis of the liability is a statute of the United States.

(a) *The statute applicable.*

The statutory requirement that steamships of the character of the "Great Northern" shall be furnished with a competent surgeon is found in the Act of Congress of August 2, 1882, c. 374, Sec. 5 (Sec. 8002, U. S. Compiled Stats. Ann.), which provides as follows:

> "In every such steamship or other vessel there shall be properly built and secured, or divided off from other spaces, two compartments or spaces to be used exclusively as hospitals for such passengers, one for men and the other for women. * * * And every steamship or other vessel carrying or bringing emigrant passengers, or passengers other than cabin passengers, exceeding fifty in number, *shall carry a duly qualified and competent surgeon or medical practitioner, who shall be rated as such in the ship's articles,* and who shall be provided with surgical instruments, medical comforts, and medicines proper and necessary for diseases and accidents incident to sea-voyages, and for the proper medical treatment of such passengers during the voyage, and with such articles of food and nourishment as may be proper and necessary for preserving the health of infants and young children; *and the services of such surgeon or medical practitioner shall be promptly given, in any case of sickness or disease, to ANY of the passengers, or to any infant or young child of any such passengers, who may need his services.* * * *"

(b) *The question of due care in the selection of the surgeon.*

The statute just quoted has been construed by the courts in but a few instances. It is the contention of the appellees that the owners of a steamship performed their full duty when they exercised due and reasonable care and diligence in the selection of a surgeon for service on the vessel. The appellant, on the other hand, contends that the statute requires that the vessel be actually furnished with a competent surgeon, and that the exercise of due care in the selection, if as a matter of fact an incompetent man is selected, does not meet the requirements of the law. The appellant also contends that the evidence in the case shows conclusively that due care and diligence was not in fact exercised by the officers of the steamship company in the selection of the surgeon of the vessel who treated the injuries sustained by Mr. Hutchins, and that in any event the vessel is liable for the negligence of its surgeon.

There apparently is but one Federal case that supports the theory of the appellees. It is the case of *The Napolitan Prince,* 134 Fed. 159. This case holds that the errors, mistakes or negligence of a ship's doctor in caring for a passenger are not imputable to the ship, where it was not negligent in selecting him. The case, however, contains nothing but the bare statement unsupported by the citation of any decisions, does not refer to or discuss the statutory duty, ignores the fact that the statute requires that a competent surgeon be

actually furnished and not merely due diligence and care in the selection, and ignores the further fact that the statute by requiring that the surgeon shall be rated in the ship's articles places him on the same footing as any officer of the ship or member of the crew.

The case of *Laubheim* vs. *DeKoninglyke N. S. S. Co.,* 107 N. Y. 228, 13 N. E. 781, held that where a surgeon is selected for duty on shipboard, the ship owners are bound only to the exercise of reasonable care and diligence in the selection of a competent person for the position, and are liable, not for the negligence of the surgeon, but only for their own negligence in making the selection. In this case, however, the evidence was contradictory as to the propriety of the surgeon's treatment. The lower court (51 N. Y. Super. Ct. 467) held that the defendant was not liable because the surgeon's act did not cover the performance of any obligation of the defendant to the plaintiff. The decision on appeal was based upon the cases of *Chapman* vs. *Railway Company,* 55 N. Y. 579; *McDonald* vs. *Hospital,* 120 Mass. 432, and *Secord* vs. *Railway Company,* 18 Fed. 221. One of these cases involved the doctrine of fellow servant, and had no relation to the duty a carrier owes to its passengers. Only one of them concerned the relationship of carrier and passenger. These cases, however, do show that a much higher degree of care, even in cases involving the fellow servant doctrine, is required in the selection of a servant, than was given by the appellees in the case at bar.

The case of *Chapman* vs. *Railway Company,* 57

N. Y. 579, held that, "in employing subordinates the principal *must exercise great care, and is required to institute affirmative inquiries to ascertain their character and qualifications, and negligence in this respect will create a liability.*"

In *McDonald* vs. *Hospital,* 120 Mass. 432, it was merely held that the Massachusetts General Hospital, a charitable institution, with no capital stock, no provision for making dividends or profits, and holding its funds in trust to sustain the hospital, was not liable for the negligence of a physician, or for the unauthorized assumption of one of the hospital attendants to act as surgeon, because under such circumstances the only contract that could be implied was to use reasonable care in the selection of its agents.

The case of *Secord* vs. *Railway Company,* 18 Fed. 221, was one where a passenger on a train was injured by a collision. There was a conflict of testimony as to the advice and treatment rendered by the surgeon provided. The Court charged that the railroad company having assumed to furnish a surgeon *had taken upon itself the duty and obligation of furnishing a competent surgeon,* and not beyond that. That the person selected *must be a competent man,* reasonably fitted for the duties he is called upon to perform; that his status was different from the other servants, in that the plaintiff might have selected another physician, and that if the surgeon was a competent man, and a proper and responsible person for the railroad company to select, it would not be liable for a particular case of negligence. *If, on the other hand, he was in-*

competent the responsibility would rest on the company. (Pp. 224, 225.)

It will be seen that neither of these three cases support the broad doctrine laid down in *Laubheim* vs. *De Koninglyke N. S. S. Co., supra.*

In the *C. S. Holmes,* 209 Fed. 970, the owner of a vessel was held not liable for the negligence of a physician employed by the master to treat an injured seaman, where the master exercised reasonable care in the selection, but this was on the theory that the duty was analogous to that required in employing competent fellow servants, and upon the further theory that where the employer engages a physician to treat injured employees and receives no profit himself, he is not liable if ordinary care is used in selecting the physician. The duty that a carrier owes to a passenger is of a much higher nature.

There are a number of cases where the questions of master and servant and fellow servants were involved, that pass upon the question of the duty of the master to investigate the competency of the servant. These cases are to the effect that an employer is not justified in assuming that a servant who seeks a position is well qualified for it, and that it is well established that where the service in which the servant is employed is such as to endanger the lives and persons of employees, or where peculiar fitness is required, the master, upon engaging such servant, *is required to make reasonable investigation into his character, skill,*

habits of life, and fitness for the duties assigned to him.

> *Western Stone Company* vs. *Walen,* 151 Ill. 472, 38 N. E. 241, 244;
> *Mann* vs. *Del. & Hud. Canal Co.,* 91 N. Y. 495;
> *Norfolk & W. R. Co.* vs. *Nuckols,* 91 Va. 193, 21 S. E. 342, 347;
> *Ala. & F. R. Co.* vs. *Waller,* 48 Ala. 459.

In *Evansville & T. H. R. Co.* vs. *Guyton,* 115 Ind. 450, 17 N. E. 101, 103, the Court said:

> "In case peculiar fitness was required, or special qualifications demanded for the service to be performed, unless it was assured by the previous like service of the conductor of his fitness, *the duty of the company required it to institute affirmative inquiries in order to ascertain his qualifications in that regard."*

In the case of *Richardson* vs. *Carbon Hill Coal Co.,* 10 Wash. 648, 39 Pac. 95, a fellow servant case, it appeared that the physician was incompetent, and there was no direct proof that the company had been negligent in selecting him. It was there held that the company must in any event have exercised reasonable care in the selection of the physician, and that *the mere possession of a diploma or license would not be sufficient evidence of his competency,* for having this he might still be totally unfit to perform the services of a physician.

These cases all go to show that a much more careful investigation as to the qualifications of an employee is required than was made by the appellees in this case.

(c) *The incompetency of the surgeon of the vessel as a matter of law.*

The uncontradicted evidence in the case shows that Dr. McAdory was incompetent. Aside from this, his incompetency is established, as a matter of law, by the manner in which he treated the injury.

A single act under some circumstances may show an individual to be an improper and unfit person for a position of trust or for a particular service. So the manner in which a specific act is performed may conclusively show the utter incompetency of the actor and his inability to perform a particular service.

Baulec vs. *N. Y. & H. R. Co.,* 59 N. Y. 356.

There may be negligence of such a character in the discharge of responsible functions or the performance of a dangerous duty, as possibly to amount to proof of the unskillfulness of the person who is so grossly negligent.

Kindell vs. *Hall,* 8 Colo. App. 63, 44 Pac. 781.

A single act, with the circumstances surrounding it, may tend very strongly to show the incompetency of the actor to perform the service to which he was assigned.

Evansville & T. H. R. Co. vs. *Guyton,* 115 Ind. 450, 17 N. E. 101, 103.

"The delinquency which caused the injury may be of such a flagrant character as to warrant the conclusion that only an unfit servant could have committed it."

Editorial note, 48 L. R. A. 387.

(d) *The statutory duty to furnish a competent surgeon on the vessel and the liability for negligence of the surgeon.*

There seems to be no sound reason why a passenger who has suffered by reason of the incompetence or negligence of the surgeon of a ship should not recover damages from the vessel, or why the surgeon should be placed on any different footing than any other officer or employee on the vessel who is selected to perform a duty for the passengers.

The general rule is that a passenger on a vessel injured while on a voyage without his fault, through the negligence of the officers or employees, is entitled to no less care from the ship than a seaman, and its duty is not fulfilled by giving him such care as an ordinary unskilled person can afford him.

Northern Commercial Company vs. *Nestor,* 138 Fed. 383, 70 C. C. A. (9th Circuit) 523.

In *Korzib* vs. *Netherlands-American Steam Nav. Co.,* 169 Fed. 917, the vessel was held liable for the negligence of a stewardess, upon the theory that she, being one of the vessel's agents, did not perform her full duty to the passenger.

Under a statute requiring a full complement of licensed officers and a full crew it was held in *Northern Commercial Company* vs. *Lindblom,* 162 Fed. 250, 89 C. C. A. 230, that *the officers and crew must be competent,* not only for the ordinary duties of an uneventful voyage, but for any exigency that is likely to happen.

In construing the "Harter Act," which provides that if the owner of a vessel shall exercise due diligence to make the vessel in all respects seaworthy, etc., neither the vessel nor owner shall be liable for loss or damage to cargo, resulting from faults or errors in navigation, etc., a number of well-considered cases have held that such provisions *do not change the general maritime law, so as to relieve the owner from his obligation to provide a seaworthy vessel and substitute therefor an obligation merely to use due diligence to see that she is seaworthy.*

The Carib Prince, 170 U. S. 655, 660-662, 42 L. Ed. 1181, 1186;
The Ninfa, 156 Fed. 512;
International Nav. Co. vs. *Farr & Bailey Mfg. Co.,* 181 U. S. 218, 45 L. Ed. 830;
Nord-Deutscher Lloyd vs. *President, etc. of Ins. Co. of North America,* 110 Fed. 420, 425, 49 C. C. A. 1;
The C. W. Elphicke, 122 Fed. 439, 58 C. C. A. 428.

In *The Cygnet,* 126 Fed. 742, 61 C. C. A. 248, *it was held that the "Harter Act" did not relieve a vessel* from liability for loss of cargo resulting from the gross fault or negligence of the master sufficient to raise a presumption of his incompetency, *merely upon a showing that the owners had no knowledge or reason to believe that he was incompetent, that being insufficient to establish "the due diligence" required by the statute, the burden of proving which under such state of facts rested on the vessel.* The Court on pages 742 and 746 of the opinion in this case says:

"All that appears in the record in reference to him (the master of the tug) is that he was an engineer, had sailed on the Cygnet for two seasons as such, had been captain of another small steamer, had acted as a pilot up and down the Merrimac River, had a license as a pilot on that river which permitted him to act as master of a tug of the tonnage of the Cygnet, and had been her master a short time before the barge was lost. There is no evidence in the record that the owners of the tug, either the record owners or the owners *pro hac vice,* had made any particular inquiries as to his competency.

"In our prior opinion, in determining that the loss occurred through the fault of the master of the tug, we said as follows:

" 'It appears that the Captain of the tug neither looked to see whether the tow was straightened out on its course, nor received any information from the lookout in that respect after passing the red buoy.'

"This red buoy, we will note, was at the critical point in the navigation of the river. An omission so gross as this raises so strong a presumption of fact that the master was not competent as practically to throw the burden on the petitioners to establish the proposition that they used due diligence with reference to his selection, whether the statute does or does not impose such a burden. Yet the other facts which appear in the record, so far from meeting this presumption, strengthen it. We are, therefore, not satisfied that whoever controlled the tug used the due diligence which the statute required in the selection of this master necessary to justify us in relieving her from the liability for this loss which the common law imposed as the result of gross negligence at the critical time."

Under the Passengers' Act of Great Britain, passed August 14, 1855, which provided that *every passenger*

ship should carry a duly qualified medical practitioner, and that the owner should furnish a proper and necessary supply of medicines to be properly packed and placed under the medical practitioner's control, it was held in *Allen* vs. *State S. S. Co.,* 132 N. Y. 91, 30 N. E. 482, that the ship owner had no supervision over the medical practitioner, and *its duty ceased on complying with such requirements,* and that it was therefore, not liable for injuries incurred by a passenger by taking calomel furnished by the medical practitioner through negligence or mistake, in response to a request for quinine.

The effect of this case, which construed an Act of Parliament similar to our Federal Statute relative to furnishing a competent physician for passanger vessels, is to hold that it is the duty of the carrier to comply with the statute, that is to actually furnish a competent surgeon. It does not hold that this duty can be performed by merely exercising diligence or due care in the selection.

To the same effect is the case of *O'Brien* vs. *Cunard Steamship Company,* 154 Mass. 272, which construes our Federal Statute, and holds that the ship owners do their whole duty if they *employ a duly qualified and competent surgeon* and have him in readiness for such passengers as choose to employ him, but that they cannot interfere in the treatment by the medical officer when he attends a passenger, and are not responsible for his negligence and want of care in performing surgical operations.

This case does not construe the law so as to warrant the substitution of due care in the selection of the sur-

geon for the statutory duty to actually provide a competent person.

No sufficient reason appears in any of these cases, however, why the vessel should not be liable for an act of negligence by a surgeon towards a passenger, the same as would be the case if the negligence resulted from the act of any officer or employee on the vessel.

A surgeon of a vessel is a seaman the same as a pilot, a ship's carpenter or a boatswain.

U. S. vs. *Thompson,* Fed. Cases, 16,492.

A vessel is liable for damages for a collision, which was entirely the result of the gross mismanagement of a pilot which the law compelled the master to take.

The China, 74 U. S. 7, 19 L. Ed. 67.

The rule is concisely stated in the case of *Sherlock* vs. *Alling,* 93 U. S. 99, 23 L. Ed. 819, 822, where the Supreme Court of the United States, in a case involving the negligence of a pilot, said:

> "By the common law the owners are responsible for the damages committed by their vessel, without any reference to the particular agent by whose negligence the injury was committed. By the maritime law the vessel as well as the owners, is liable to the party injured for damages caused by its torts. By that law the vessel is deemed to be an offending thing, and may be prosecuted without any reference to the adjustment of the responsibility between the owners and employees for the negligence which resulted in the injury. Any departure from this liability of the owners, or of the vessel, except as the liability of the former

may be released by a surrender of the vessel, has been found in practice to work great injustice. The statute ought to be very clear before we should conclude that any such departure was intended by Congress."

There is no sound reason why a vessel should be held liable for the negligence of a pilot, where the owners have no power of selection, and in the case of a surgeon, though they have the opportunity of selecting him, should not be held liable unless in such selection they have been wanting in due care. In any event it is the duty of the vessel to furnish a surgeon who is in fact competent.

CONCLUSION.

The libellant in this case is entitled to recover.

"When carriers undertake to convey persons by the powerful and dangerous agency of steam, *public policy and safety require that they be held to the greatest possible care and diligence; that the personal safety shall not be left to the sport of chance, or the negligence of careless servants.*" (Citing *R. R. Co.* vs. *Derby*, 14 How. 468.)

"* * * Although the carrier does not warrant the safety of passengers at all events, yet his undertaking and liability as to them go to the extent that he or his agents, where he acts by agents, shall possess competent skill, and so far as human care and foresight can go, that he will transport them safely."

"* * * *The carrier is required, as to passengers, to observe the utmost caution characteristic of very careful, prudent men. He is responsible for injuries received by passengers in the course of their transportation, which might have been avoided or guarded against by the exercise*

on his part of extraordinary diligence aided by the highest skill. And this caution and diligence must necessarily be extended to all agencies or means employed by the carrier in the transportation of the passenger."

Pennsylvania Company vs. *Roy,* 102 U. S. 451, 455, 456; 26 L. Ed. 144.

The appellees fell far short of the duty they owed the appellant under the law, both as to the shower bath facilities they furnished and as to the surgeon they employed for service on the vessel.

Respectfully submitted,

FREDERICK MILVERTON,
Attorney and Proctor for Appellant.

THOMPSON & CATHCART,
GEO. A. DAVIS,
Of Counsel.

Dated, San Francisco, Cal., April 25th, 1918.